IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 637 OF 2003

1.Janhit Manch,)
Kuber Bhuvan, Bajaj Road,)
Vile Parle (West),)
Mumbai-400 056.)
2.Bhagvanji Raiyani, the President)
of the 1st Petitioner, residing)
at Sahakar, 13, Hatkesh Society)
6th Road, Juhu Scheme, Vile)
Parle (West), Mumbai-400 056.)..PETITIONERS

Versus

1.The State of Maharashtra)
through its Principal Secretary)
Urban Development Department,)
Mantralaya, Mumbai-400032.)
2.The Brihanmumbai Municipal)
Corporation (Bmc.) through its)
Commissioner, Mahapalika Marg,)
Mumbai-400 001.)
3.Jvpd Tenants & Residents)
Association, C/o. Walkman,)
Kamal Kunj, Road No.4, Juhu)
Scheme, Vile Parle (West),)
Mumbai-400 056)
through its Secretary Shri)
Utasal Karani, Residing at)
Hem Niketan, N.S.Road No.5,)
Suvarna Nagar Society, Vile)
Parle (West), Mumbai-400 056.)
4.Slum Rehabilitation Authority,)
5th Floor, Griha Nariman Bhavan,)
Bandra (E), Mumbai-400 051.)
5.The Maharashtra Chamber of)
Housing Industry 9, Ruby House,)
113 Lady Jamshedji Road, Opp.)
Sitladevi Temple, Mahim (West))
Mumbai-400 016.)
6.M/s.Shah Construction Company)
24-A Shree Laxmi Niwas, M.G.Road)
Ghatkopar (West), Mumbai-400 086)
7.M/s.Gurukrupa Developers,)
Neelam Industrial Estate,)
Shantilal Mody Cross Road No.2,)
Kandivali (West), Mumbay-400 067)
8.Cable Corporation of India Ltd.)

Laxmi Building, 6, Shoorji)
Vallabhdas Marg, Mumbai-400 001.)
9.Harshad P. Mehta, Mehta Mahal)
Dadasaheb Phalke Road, Dadar,)
(West), Mumbai-400 028.)
10. M/s.Natwar Parikh & Co.,)
Pvt. Ltd., Natwar Parikh)
House, 107-109, P.D'Mello Road)
Mumbai-400 009.)..RESPONDENTS

Mr. Aspi Chinoy, Senior Counsel, Amicus Curaie, present.

Mr. B. Rayani, President of Petitioner in person present.

Mr. Ravi M.Kadam, Advocate General with Mr.Niranjan Pandit, Asst. Govt. Pleader for Respondent No.1.

Mr. K.K. Singhvi, Senior Counsel with Mrs.P.A. Purandhare & Mr. V. Mahadik for Respondent No.2.

Dr. Virendra V. Tulzapurkar, Senior Counsel, with Mr. S.G. Surana for Respondent No.4.

Dr. Virendra V. Tulzapurkar, Senior Counsel, with Mr. D.J. Khambatta and Mr. Rahul Dwarkadas i/by M/s. Wadia Ghandy & Co. for Respondent No.5.

Mr. Janak Dwarkadas, Senior Counsel, with Mrs. Madhavi Divan, Mr. Paresh Shah and Ms.Pooja Bhatia i/by M/s.Shah & Sanghavi for Respondent Nos.6 & 7 and for Applicants in N/M. Nos. 469/04 & 540/05 & Ch/S.No.82/06.

Mr. D.J. Khambatta, Sr. Counsel with Mr. Rahul Dwarkadas i/by Wadia Ghandy & Co. for Respondent No.10.

Mr. Aniruddha Joshi i/by T.S. Patwardhan for Applicant in N/M.No.535/04 & 562/04.

Mr. J. Reis, with Mr. H.V. Gala for Applicant in N/M. No.577/04.

Mr. T.N Subramaniam, Sr. Counsel i/by Ghanekar & Co. for Applicant in N/M. No.712/04 & Ch/S.No.242/04.

Mr. Milind Sathe, Senior Counsel, with Ms. Usha Gadagkar i/by. M/s. Khona & Kayser, for

Applicants in N/M. No.204/05.

Mr. R.S. Deshpande for Applicant in N/M. No.222/05 & Ch/S.No.101/05.

Mr. Snehal K. Shah i/b. Purnanand & Co. for Applicants in N/M.No.451/05.

Mr. Aniruddha Joshi i/by L.J. Law for Applicant in N/M.No.473/05.

Mr. T.N. Subramaniam, Sr.Counsel i/b. Purnanand & Co. for Applicants in N/M.Nos.388/05 & 422/05.

Mr. Aniruddha Joshi i/by Mr. Nivit Srivastava for Applicant in N/M.No.285/05.

Mr. M.S. Rane, i/b. Purnanand & Co. for Applicants in N/M.Nos.481/05 & 481/05.

Mr. S.K.Sen with Mr.R.A.K. Nijam Sani for Applicant in N/M. No.401/05.

Mr. F. Pooniwala with Mr. Y.R. Shah for Applicant in Ch/S.No.305/05.

Mr. Firoz Ansari, for Applicant in N/M. No.477/04.

Mr. Atul G. Damle for Applicant in N/M. No.537/04.

Ms. Deepa Chavan i/by. Mr. Prasannna Sarpotdar for Applicant in N/M. No.67/05 & 68/05.

Mr. M.U. Pandey for Applicant in N/M. No.100/05 & 53/06.

Mr. J.S. Kini for Applicant in N/M. No.136/05.

Mr. Raval Shah for Applicant in N/M. No.250/05.

Mr. Rajiv Narulla i/by. Jhangiani Narulla & Associates for Applicant in N/M. No.330/05.

Mr. Niranjan Lapasia i/by. Niranjan & Co., for Applicant in N/M. No.375/05.

Mr. Viral Vora for Applicant in N/M. No.385/05.

Ms. Snehal Paranjpe i/by Little & Co., for Applicant in N/M. No.403/05.

Mr. L.D. Shah i/by L.D. Shah & Co. for Applicant in N/M. No.423/05.

Mr. D.S. Sakhalkar for Applicant in N/M. No.521/05 & 524/05.

Mr. Manojkumar Upadhyay for Applicant in N/M. No.522/05, 523/05 & 545/05.

Mr. Girish Lodha for Applicant in Ch/S.No.219/04.

Mr. Satyan Vora for Applicant in Ch/S.No.277/04.

Mr. Ketan R. Parikh, Applicant-in-person in Ch/S.No.1/05.

Mr. J. D'Silva for Applicant in Ch/S.No.121/05.

Ms. V. Mahadik with Ms. Neeta Madhyen i/by S.M. Associates for Applicant in Ch/S.No.181/05.

Mr. T.N. Subramaniam, Sr.Counsel, with Mr. Kishore Thakoredas i/by Kishore Thakoredas & Co. for Applicant in Ch/S.No.236/05.

Mr. S.G. Surana for Applicant in Ch/S.No.241/05.

CORAM: F.I. REBELLO &
DR. D.Y.CHANDRACHUD, JJ.
DATE : 20TH NOVEMBER, 2006.

JUDGMENT (PER F.I. REBELLO, J.)

. The creative judicial interpretation of Article 21 by our constitutional Courts, has broadened our vision, in understanding the expression "right to life". Preventing degradation of our ecology and protection of our environment, including the right to clean drinking water and pollutant free atmosphere are some of its facets. Ecological factors as judicially understood, indisputably are relevant considerations in Town

and Country Planning Statutes. Courts to preserve the environment and ecology of "Earth" our home for the present and future generations whilst interpreting environmental laws, lean in favour of protection. The questions raised by the petitioners and which fall for our consideration, give rise to a host of legal issues. Can the State, citing its financial inability to provide housing to encroachers on public and private lands residing in structures which came up before 1-1-1995 to whom it has granted protection from eviction or its inability to free RG areas, parks, gardens, footpaths and roads from encroachment, enact legislation, granting TDR to builders which TDR is to be used in the suburbs of Mumbai by permitting increase of F.S.I. from 1 to 2. This apart from increasing the burden on infrastructural facilities permits construction without normal set backs and R.G. Areas. According to the petitioner this has resulted in affecting the quality of life of millions of citizens, staying in one room tenements and who pay their taxes and by obeying the law have either purchased or taken on rent tenements, to house themselves and their families.

. The question posed is, do these law abiding citizens who believe in the rule of law,

living in this financial capital of India, have a right to life which is meaningful and worth living with human dignity. Are their children entitled to participate in sports. on public playgrounds and enjoy recreational facilities in parks, which are to be maintained, in terms of the development plan. Do senior citizens have a right to live in an atmosphere free from pollution and suspended particulate matter. Can the State abdicate its functions to maintain and preserve the rule of law by amending the Town Planning Laws to legalise encroachments. These are some of the broad aspects which we are called upon to consider, while deciding the legal issues which arise in this petition. Though lakhs of square feet of F.S.I. in the form of TDRs have been released pursuant to the S.R.A. Schemes with the avowed object of removing slums and providing human habitation to the hutment dwellers, the problem has become unmanageable because of the State increasing the cut-off dates for protection of illegal hutments from time to time. The Municipal Corporation has prepared a document called "City Development Plan under Jawaharlal Nehru Urban Renewal Mission (JNNURM). We may refer to the projections of Slum population and the need for housing from that document.

Year	Slum popu-lation (Lakh)	Total Popul-ation (Lakh)	Formal Houses for Housing (in Lakh)	Slums. (in Lakh)
2001	69.00	119.14	12.54	12
2010	65.04	129.13	16.03	11
2020	60.35	150.39	22.51	10

The same document sets out that for a population of 12 million, in an area of 437 sq. Kms. there are only 753 parks with an area of 4.4 Sq.Kms. Forests which this Court had to intervene to protect, cover an area of 174.15 sq. Km. meters. Against the present requirement of 3900 MLD of water supply, what is available is 3100 MLD. There is a vehicle population of 1.2 million with annual increase of of 4 to 5%. 9.9 million people commute daily. Out of 2600 MLD of sewage only 1500 is collected and disposed off in an environmentally acceptable manner. The transportation system is plagued by inadequate capacity of the existing arterial roads, overriding surface of the roads, traffic bottle-necks and over burdened suburban rail system. The traffic density at peak hours is 6 to 8 kms. per hour. Based on these statistics, Petitioners argue that provisions, permitting usage of additional F.S.I. in the suburbs are illegal,

null and void.

2. The power conferred on a constitutional Court to strike down a Legislation may be considered from excerpts from Thomas M. Cooley on a 'Treatise on the Constitutional Limitations".

. Courts in matters of striking down a law, conscious of the fallibility of the human judgment, should shrink from exercising in any case, where it can conscientiously and with due regard to duty, decline the responsibility. Being required to declare what the law is in the cases which come before them, Courts must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. But the courts sit, not to review or revise the legislative action, but to enforce the legislative will and it is only where it finds that the legislature has failed to keep within its constitutional limits, are courts at liberty to strike down the law. Nevertheless, in declaring a law unconstitutional a court must necessarily cover the same ground which has already been covered by the legislative judgment, and must not indirectly overrule the decision of that coordinate department.The task is therefore, a delicate one, and only to be entered

upon with reluctance. To hold that a body to whom the people have committed the sovereign function of making the laws for the commonwealth, have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold and it is almost equally so when the Act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident actions or error of judgment, than to intentional disregard of obligation. But it is a duty which Courts in a proper case are not at liberty to decline.

. The law on this subject appears to be, that, except where the constitution has imposed limits upon the Legislative power, it must be considered as practically absolute, whether it accords with natural justice or not in any particular case. The courts are not the only guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their

sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the Government, being prima facie valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the constitution and the case shown to come within them.

. We may also consider the tests for judicial review of subordinate legislation, more so a regulation made under the Town Planning Statute. Reference may be made to the judgment of the Supreme Court in Bombay Dyeing & Mfg. Co. Ltd.(3) vs. Bombay Environmental Action Group, (2006) 3 SCC 434 and to the following Paragraphs 104, 105, 115, 116, 117,118, 119 and 123 which read as under:-

104. A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned

Counsel appearing on behalf of the appellants that the courts cannot exercise their power of judicial review at all. By reason of any legislation, whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the patent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith.

105. In P.J. Irani v. State of Madras, this Court has clearly held that a subordinate legislation can be challenged not only on the ground that it is contrary to the provisions of the Act or other statutes; but also if it is violative of the legislative object. The provisions of the subordinate legislation

can also be challenged if the reasons assigned therefor are not germane or otherwise mala fide. The said decision has been followed in a large number of cases by this Court. (See also Punjab Tin Supply Co. vs. Central Govt.)."

115. Furthermore, interpretation of a town planning statute which has an environmental aspect leading to application of Articles 14 and 21 of the Constitution cannot be held to be within the exclusive domain of the executive.

116. There cannot be any doubt whatsoever, that the validity and/or interpretation of a legislation must be resorted to within the parameters of judicial review, but it is difficult to accept the contention that it is totally excluded.

117. Unreasonableness is certainly a ground of striking down a subordinate legislation. A presumption as to the constitutionality of a statute is also to be raised but it does not mean that the

environmental factors can altogether be omitted from consideration only because the executive has construed the statute otherwise.

118. It is interesting to note that the scope of judicial review on facts has been held to be permissible in law. (See Manager, Reserve Bank of India v. S. Mani, Sonepat Coop. Sugar Mills Ltd. vs. Ajit Singh and Cholan Roadways Ltd. vs. G. Thirugnanasmbandam).

119. In Anil Kumar Jha vs. Union of India, it was held that in an appropriate case, the Supreme Court may even interfere with a political decision including an action of Speaker or the Governor of the State although it may amount to entering into a political ticket. (See also Rameshwar Prasad (VI) vs. Union of India.)

123. For the foregoing reasons, we are of the opinion that in cases where constitutionality and/or interpretation of any legislation, be it made by

Parliament or an executive authority by way of delegated legislation, is in question, it would be idle to contend that a Court of superior jurisdiction cannot exercise the power of judicial review. A distinction must be made between an executive decision laying down a policy and executive decision in exercise of its legislation-making power. A legislation be it made by Parliament/Legislature or by the executive must be interpreted within the parameters of the well-known principles enunciated by this Court. Whether a legislation would be declared ultra vires or what would be the effect and purport of a legislation upon interpretation thereof will depend upon the legislation in question vis-a-vis the constitutional provisions and other relevant factors. We would have to bear some of the aforementioned principles in mind while adverting to the rival contentions raised at the Bar in regard to interpretation of DCR 58 as well as constitutionality thereof."

. Bearing these principles in mind, let us examine the facts on record and the legal issues involved.

3. The Petition was filed for reviewing the existing "Development Control Regulations for Greater Bombay, 1991". Petitioner No. 1 claims as an N.G.O. espousing legal issues concerning the State and the nation before the concerned authorities for resolution, in the larger public interest. The second Petitioner is a Resident of Juhu Vile Parle Development Scheme and President of the first Petitioner. Some of the reliefs as originally prayed for read as under :-

> "(f) The no TDR corridor provided under sub section 11, Appendix VII of Regulation 34 as originally provided in D.C. Regulations, 1991 be strictly restored and retained as it is i.e. any further grant of TDR be stopped in the areas: (i) Between the tracks of the Western Railway and the Swami Vivekanand Road; (ii) Between the tracks of the Western Railway and the Western Express Highway; (iii) Between the tracks of the

Central Railway (Main Line) and the Lal Bahadur Shastri Road."

. Relief was also sought in the form of Prayer Clause (j) which was re-numbered as (ji) which reads as under :

"A Committee of experts comprising architects, social activists, lawyers, bureaucrats and retired State and BMC Officers be appointed by this Hon. Court to review the TDR policy in the larger interest in view of the submissions made in this petition and to frame norms and guidelines for future implementation and submit its report within two months for the consideration of this Hon. Court."

. The Petitioners have also sought relief by way of Prayer Clause (h) which reads as under :

"The Respondents be directed to lay down parameters of the discretionary powers given to the B.M.C. Commissioner under the D.C. Regulation No. 64 particularly in the matter of concessions in open spaces and parking in consultation with

the committee as noted in Prayer Clause (j) (now renumbered as (ji)."

. This Petition was directed to be treated as PIL Petition pursuant to the order of this court dated 30.3.2003. On 08.07.2004 this court was pleased to pass the following order :-

"In the meantime and till further orders Corporation is directed not to grant permission for utilisation of TDR in the corridor area."

. The ad-interim order was thereafter continued by the order of this court dated 15.7.2004 and continues till date.

. Prayer (ee) was added pursuant to an amendment, and reads as under :-

"This Hon'ble Court be pleased to quash Appendix VII.A (heritage TDR) Regulation 5 & 6 & Appendix VII-B (SLUM TDR) Regulations 9, 10 & 11, insofar as they purport to permit the use of Heritage & Slum TDR in the three prohibited zones set out in Appendix VII.A. Regulation

11(a) (b) & (c)."

. By way of further amendment, the following prayer clause was added as Prayer Clause (j) which reads as under :

"that this Hon'ble Court be pleased to declare that DC Regulation 34 and Rule 10 of Appendix VII are ultra vires Article 14 & 21 of the Constitution of India".

. The petition as originally filed was against the use of slum and heritage TDR in the corridor areas which are described in prayer clause (f). This relief was made more specific by challenge to App. VII.A and App.VII-B. in so far as heritage and slum TDR are concerned. The subsequent amendment introduced Prayers to declare D.C. Regulation 34 and Regulation 10 of App. VII as ultra vires Article 14 and 21 of the Constitution of India as also other reliefs. The Petition as filed did not specifically invoke either Article 14 or 21 of the Constitution of India. There were however, pleadings regarding open spaces and parking and about the manifold increase in the population and traffic congestion in the suburbs, more particularly in Vile Parle

area, caused by indiscriminate use of T.D.R.It is submitted that the discretion conferred upon the Municipal Commissioner by Regulation 64(b) was being exercised arbitrarily, open spaces have been reduced to 3 mtrs. between the buildings, regardless of the height, which is more or less a mockery of the notion of side open spaces being sufficient to provide adequate light and air at all floor levels. Considering the existing infrastructure and amenities as well as current plans for further expansion, it is submitted that a Carrying Capacity study is needed to determine how much additional floor space, each part of the city can sustain. The study also must indicate how much additional recreational or other public space must be made available in the area, before further floor space additions are permitted. By the first amendment to the Petition, it was pointed out that the Respondent themselves had concluded vide App.VII that considering the extent of development/construction and the existing infrastructure, the three corridor/areas were not capable of supporting any additional population, if the additional structures were constructed by use of TDR. The location of these areas is such that there is no room for increasing the infrastructure to cope with the increase in residence/structures

that would follow if TDR was allowed. The Respondents have amended the Development control Regulations to provide in Appendix VII.A for TDR to the owner, lessee of any heritage building who suffers loss of developmental rights due to restriction imposed by the Commissioner/Government under Regulations 67. Regulation 67, Appendix VII.A does not prohibit the use of such Heritage TDR in the said three prohibited zones, delineated in Regulations 11(a)(b) and (c) of Appendix VII. It is submitted that the object of prohibiting additional constructions/residence in the prohibited area was having regard to the extent of existing development/congestion. The existing infrastructure is such that the area cannot take the burden of additional constructions/residents.

4. By the subsequent amendment, it has been pleaded that permissible F.S.I. under the Regulation in the suburbs, continues to be 1.00. For the utilisation of TDR the Respondent No. 1 has permitted a 100% loading on the existing FSI throughout the suburbs i.e. the stipulated FSI of 1 can be increased/loaded upto a FSI of 2 by using TDR. This Floor Space Index has been stipulated without having regard to the carrying capacity/extent of development/construction which

the existing infrastructure/amenities (open areas for recreation, roads, sewers, water supply etc.) can support/cope with. By permitting F.S.I. to be doubled by use of TDR, Regulation 34 & Appendix VII completely undermine the concept of FSI and the need for maintaining a co-relation between the available infrastructure/amenities & permissible development.The TDR policy permits indiscriminate use of TDR in the entire suburbs in areas to the North of the generating plot, notwithstanding the fact that the open areas, infrastructure and civic amenities available in many areas are already inadequate to cope with the additional development/occupancy. Though the TDR policy has now been in force for more than ten years, and has resulted in additional construction of approx 48 lakh sq. mts., 100,000 tenements and almost half a million additional inhabitants, no study/review has been conducted even till date about the manner in which it has operated or its consequences on the localities/their inhabitants and the civic amenities and infrastructure. Though the grant of TDR lessens the fiscal pressure on the Respondent Nos. 1 and 2, in effect it transfers the burden on the citizens of Mumbai and particularly the occupants/residents of the western suburbs), who have to bear the consequences of additional

pressure on the already stretched/overburdened infrastructure. Such doubling of the permissible FSI without corresponding increase in the provision of services like parks/open areas, water, sewerage etc. have made large parts of the suburbs virtually uninhabitable and have resulted in ecological and urban degeneration.

. The population density in Bandra (1991) was 75,3462 per sq. km. which was more than that of the most congested areas of the Island City such as Kalbadevi or Dadar - where use of TDR is not permitted. Densities in Santacruz and Vile Parle are comparable to the Island City. Mumbai already has a chronic shortage of open spaces. Even if the unlisted parks & Gardens and beaches and promenades are included on the basis of a population of 12 million, the open space ratio in acres per thousand population is only .088. New York & London have 10 acres & 7 acres of open space per 1000 population. The International norm adopted by the United Nations Development Agency is approx. 4 acres per 1000 population. The demand for water in 2003 was 3500 million litres per day but the Respondent No. 2 could supply only 2950 million litres per day -i.e. a shortfall of 550 million litres per day. Even these figures of shortages are based on an

artificial and inadequate norm of 135 litres per day in high rise buildings, 90 litres per day in the chawls and only 45 litres per day in the slums which are most prevalent in the suburbs. The deficit is so chronic that the Corporation has been issuing press statements that new constructions will not receive water connections till 2007. Mumbai's road width is hopelessly inadequate. The vehicle density is 700 vehicles per km of road and as a consequences of increasing congestion, the average speed of BEST Buses has decreased from 21 kms/hr to only 12 kms per hr. The Economic Times noted on 19th Sept. 2005 that in Mumbai vehicles increase by 20% every year; Population by 11% per year, but lane mileage increase is only 1% per year. As per a study commissioned by the MMRDA (through the NEERI) in 1992, the highest vehicular pollution levels were found in Bandra, Vile Parle, Santacruz, Jogeshwari and Malad. The local train system (which enables millions to commute from the suburbs to the city and back each day) has a design capacity of about 1800 passengers per train and a crush load capacity of 2600 passengers per train. In contrast the average peak hour loading of trains is in excess of 4500 passengers per train. As per the MCGM Web site only 65% of the population is connected to sewerage facilities. An underground

sewer system exists only in the island city - there are no underground sewers in the suburbs. On 8th August, 2005 the Indian Express reported that the Dy Mun. Commissioner (Environment & Waste Management) Mr. P.R. Sanglikar stated that North of Mahim we depend mostly on mother Mithi (River) for drainage". TDR is being loaded in localities like J.B. Nagar, Mogra and Kondavita in Andheri East, Radha Nagar and Vakola in Santacruz East and several such areas where the BMC has not provided sewer lines. Open Storm water drains on the sides of suburban Roads are generally flowing with septic tank outflow. These Storm water drains are designed to take rain water and not for carrying sewage. This leads to a mosquito/malaria health hazard round the year. Moreover when it rains the whole area gets flooded as the Storm Water Drains are now overloaded and not functioning. The BRIMSTOWAD (Storm water Drain Project) will take a further 12 years to be completed. Presently in Jogeshwari, Malad, Goregaon and Dahisar sewage waste is discharged into the sea without the mandatory treatment. The MCGM web site states that of the 3116 mld of sewage only 436 mld gets either full or preliminary treatment i.e. approx 85% is discharged into the sea or creek untreated.

. It is therefore, submitted the existence of an already overburdened infrastructure is evident and visible to all citizens. The FSI restrictions are fixed having regard to the carrying capacity/infrastructure and amenities of an area and have a direct relation to public health, safety and the right to life of the occupants of the area. In the circumstances, Regulation 34 and appendix VII-A and VII-B which purports to permit a 100% increase in FSI (with the use of TDR) throughout the suburbs, without any consideration as to the carrying capacity of the suburbs/area and without a commensurate increase in the infrastructure and amenities,will and has resulted in urban degeneration and is clearly arbitrary and violative of Articles 14 and 21 of the Constitutions of India.

5. Mr. P.D. Nadkarni, working as Dy. Chief Engineer (Development Plan) in the office of Respondent No. 2, has filed an affidavit. It is pointed out that it is correct that in the D.C. Regulations, 1991, the F.S.I. of 1.00 was prescribed for the suburbs, having regard to the Respondent No. 2 evaluating the carrying capacity/extent of development and construction which the existing infrastructure and further

construction and other amenities, but it is not correct to say that the existing infrastructure was not able to take the load of more than 1.00 F.S.I. in the suburbs. Fixing F.S.I. at 1.00 did not mean that there was no capacity to increase the said FSI. Looking at the infrastructure, there was some flexibility for increasing the FSI in case public interest so required. Clause 14 of Appendix VII of the D.C.R. 1991 provides, that FSI of the receiving plot shall be allowed to be exceeded by not more than 0.4 in respect of D.R. available in respect of the reserved plot and further 0.4 in respect of D.R. available of the land surrendered for Road widening or construction of new roads, according to Sub-regulation (i) of Regulation 33. In other words, an additional FSI of 0.8 was allowed to be used on receiving plot. Thus the Receiving plots can utilise 1.8 FSI, i.e. 1.00 for normal and 0.4 in respect of reservation and 0.4 in respect of the land surrendered for Roads according to sub Regulation (i) of Regulation 33.

. By notification dated 15.10.1997, Appendix VII was renumbered as Appendix VIIA and another appendix VII-B was added, under Regulation 33(10). Under Clause 13 of the Appendix VII-B, it is provided that use of TDR on receiving plot,

additional F.S.I. shall not be eligible, of more than 100% in whichever combination FSI/TDR are received, provided at least 20% of the FSI shall be mandatorily kept for use of TDR generated as surplus from the Slum Rehabilitation Scheme. The source of TDR could be slum development, D.P. Reservation or D.P. Road. Under Clause 13 of Appendix VII-B the plot is allowed to use 2.00 F.S.I. i.e. 1.00 being normal and other one being 0.4 for Roads, 0.4 for Reservation and 0.2 from slum, or in the alternative full F.S.I. of 1.0 from slum T.D.R. By amendment to Appendix VIIA on 19.4.2001, the receiving plot has been allowed to utilise additional 0.8 F.S.I. either by way of a D.R. in respect of reserved plots or by way of land surrendered for road widening, or construction of new road or by way of both. There has been no change in loading F.S.I. as was envisaged in the original Appendix VIIA under Reg. 34. The receiving plots could use 1.80 FSI and now also, it is allowed to use 1.8 FSI. The receiving plots have been able to use 2.00 FSI by reason of amending Appendix VII-B. It is denied that the FSI of 2.00 has been permitted anywhere in the suburbs without any consideration having been given by the Respondent No. 2 as to whether the area in which TDR used/proposed to be used can absorb additional

construction/occupancy, having regard to the available open space, water supply, sewerage, and other infrastructure, in such area. The Development Control Regulation, is a legislative exercise and it must be presumed that the Legislature has taken all public interest into consideration before amending the D.C. Regulation. So far as the Respondent No. 2 is concerned, it has all the necessary infrastructure to absorb 2.00 FSI in the suburbs.

6. It is admitted that the TDR policy has resulted in additional construction of approx. 48 lakh. sq. mtrs. but it is denied and not admitted that the TDR policy has resulted in 1 lakh tenements and almost half a million inhabitants. The present development plan is for 1991-2010 and the entire policy of FSI and TDR is likely to be reviewed with the revision of the Development Plan taken in hand for the year 2011-2030. The law cannot be held to be bad, simply because no study or review has been conducted with regard to the implementation. The legislature has the power to review or amend the law, whenever they feel it fit to do so. This being an important, policy, is best left to legislation. There is some burden transferred on the citizens, which is bearable. It

cannot be stated that the grant of TDR has cast an unbearable burden on the citizens of Mumbai, particularly the occupants/residents of Western suburbs as alleged therein. The burden of TDR can be borne by the existing amenities such as parking space, use of water, sewerage etc. and this has not resulted in ecological and urban degeneration.

. The figures of population density in Bandra (1991) of 75,362/- per sq. km. has been denied. The 1991 Development Plan was based on the census figure of the year 1981, according to which the population density of H Ward, i.e. Bandra was 40,957/- persons per sq. km. According to 2001 Census the density of population in Bandra, H/Ward was 51,726/- persons per sq. km. That in 1981, the density of population of Kalbadevi (C/ward) area was 1,69,036 persons per sq. km. and in 2001 census it is 1,29,681 persons per sq. km. In so far as Dadar (F/ward) is concerned, according to 1981 census the density of population was 66,261 persons per sq. km. and as per 2001 census the density of population is 76,984 persons per sq. km. It is admitted that Mumbai should have some more open spaces, than it has today. The TDR policy was in fact introduced, to obtain more open spaces, such as parking spaces, gardens, R.G. and

P.G. etc. Upto June, 2005, 16 lakh sq. mtrs. of open land has been acquired by making available T.D.R. As per the Planning standard adopted for the Revised Development Plan of 1991, the open spaces in the island city, was 1/2 acre per 1000 population and 4 acres for 1000 population for suburbs. The said standards could be achieved if all the open spaces provided under the Development Plan are acquired and utilized under the Development Plan, the entire area for open spaces is admeasuring 219 lakh sq. mtrs. In so far as water connection, all the buildings are given 135 ltrs. per capita per day, 90 LPCD to Chawls as they have common toilets and 45 ltrs. LPCD to slums is provided. However, from November, 2002 all the buildings are provided 90 LPCD. The said norms are worked out taking into consideration various factors. The Respondents have no control on the passengers travelling by trains. Except for a few areas, the population is connected with sewerage facility. Wherever sewerage facility is not there, the builders/owners are required to construct septic tank, and soak pits, sewage Treatment plant etc. It is denied that presently, in Jogeshwari, Malad, Goregaon and Dahisar, sewage waste is discharged into the sea without the mandatory treatment as alleged. All precautions

are taken to prevent the breeding of mosquitoes and malaria etc. BRIMSTOVAD Project Report, contains all the information in this respect.

. It is therefore, submitted that considering this material, it cannot be said that Regulation 34 and Appendix VII.A has resulted in urban degeneration and consequently are arbitrary and violative of Article 14 and 21 of the Constitution of India.

7. Mr. Ramanand Tiwari, Principal Secretary, Urban Development Department, Government has filed an additional affidavit, pursuant to query raised by the court as to whether Government could consider imposing restrictions on development in the three wards viz H(E) Khar, Santacruz H(W), H(W) Bandra and L Kurla. The affidavit sets out that matter was examined by the Urban Development Department with the concerned Planning authority and the Government was of the view that it is neither necessary nor possible to restrict the use of TDR in the three wards. The population density figures as taken from the Census of 1981, 1991 and 2001, shows that the population density of Bandra area is almost static or has come down as compared to 1991. The other wards have shown high

populations. The rise in population density over a decade appears to be between 5 and 10 percent. TDR is generated inter alia by clearance of slums. There is substantial slum population in the city. If these slums are to be cleared, the grant of TDR would be inevitable. In other words, imposing a restriction on use of TDR in these wards would affect the slum rehabilitation programmes. The TDR is also generated for Development of reservations, roads etc. Any restriction on grant of TDR and its consequent utilization would thus affect the implementation of the Development plan. The TDR generated from the source of D.P. reservation, roads, development of slums and for heritage building upto 31.12.2005 is 6035469.32 sq. mt. Out of which 584151.38 sq. mtr. (9.67%) and 142867.56 sq. mt. (2.31%) and 309660.69 sq. mtr. (5.13%) is utilised in Bandra, Khar and Kurla Ward respectively. This clearly indicates that the utilisation of TDR is not concentrated in these 3 wards only. Since these wards are adjacent to the Island City, it is but natural that the preference would go to these wards, considering the property values for utilisation of TDR. Imposing the restriction for use of TDR in these wards would severelly affect the implementation of Development Plan and S.R.A. scheme in island city. The

development plan is due for revision in 2011 and the work for preparation of revised Development plan will be undertaken in 2008. At that time, a comprehensive review of the whole TDR policy would be undertaken. Thus imposing a restriction for use of TDR in certain Wards without studying indepth the over all settlement pattern and population distribution of Mumbai City may not be feasible or desirable. There will be substantial improvement in transportation in these wards, once the programmes undertaken by MMRDA, the State and the Municipal Corporation of Greater Mumbai under the MUTP and MULP Schemes are implemented. Similarly the Worli Bandra Sea Link and the Metro Rail Projects are major infrastructural works involving inter alia the aforesaid wards. Restricting the utilization of TDR in the corridors will be counter productive. Any such restriction will result in a multi-modal transport system being utilized i.e. first leg of the journey being completed by rail to the nearest railway station and thereafter the second leg by road. The three wards of Bandra, Khar and Kurla are well connected to the island city especially by Rail. These connections will be further improved upon the aforesaid transportation projects being implemented.

8. Apart from the petitioner and respondents there were various Notices of Motion and applications for intervention. Those Notices of Motion and the applications have been heard along with this petition and learned Counsel were allowed to address the Court. All these Notices of Motion and Applications have been disposed of by another common order. Considering the important issues involved a Senior Counsel of this Court was appointed as Amicus Curiae. The learned Amicus Curiae has focussed on the real issues which are required to be considered and decided.The petitioner No.2 appearing in person has also made oral and written submissions. The Respondents have raised three preliminary objections to the maintainability of the petition and which are :-

(i) That the petition is barred by the principle of res judicata and/or principles akin to res judicata;

(ii) There has been delay or laches and also acquiescence by the petitioners and on this count also the petition is liable to be dismissed;

(iii) Petition as filed is malafide and

the Petitioners have no locus to file the petition.

RES-JUDICATA:

9. The respondents contend that the petition should be dismissed on the principles of Res-Judicata and/or Constructive Res Judicata.

. The challenge to the D.C. Regulations 1991, was rejected by the Judgment of a Division Bench in the case of **Nivara Hakk Suraksha Samiti & Ors. vs. State of Maharashtra & Ors.**, dated 16th April, 1991 (being Writ Petition No.963 of 1991 and Companion Petitions). That Petition and the companion petitions were filed challenging the D.C. Regulations for Greater Mumbai 1991 which were brought into operation from 28th March, 1991. The challenges considered included competence of the State Legislature. The challenge is not on the basis that 1991 Regulations were valid when enacted, but have now become unconstitutional or invalid in view of changed circumstances as per decision in **Malpe Vishwanath Acharya vs. State of Maharashtra, (1998)-1 SCC 1.** Hence, on the same grounds which were urged or ought to have been urged in 1991 the challenge to DC Regulations 1991

cannot be re-agitated. In addition the following reasons have been put forth:- (a) Petitioner No.2 is a builder and has taken advantage of the 1991 Regulation and is occupying a flat in the building constructed by use of TDRs. (b) The legislation is delegated legislation only for a short duration. (c) It is a planning measure involving socio-economic aspects. (d) Thousands and lacs of individuals would be adversely affected. Relying on the legislation, occupants have vacated their premises, buildings are demolished in anticipation of new construction by use of TDRs. (e) Various schemes of acquisition of plots for public purposes, amenities, infrastructure etc. would be halted. (f) It would affect the entire planning of the city. (g) Third party rights have been created. (h) The parties have altered their position to their detriment relying on the said delegated legislation. It is, therefore, submitted that the plea of res judicata should not be disallowed on the plea that in environmental matters, unlike other matters, the pleas of res judicata, delay etc., pale into insignificance. In the instant case, no violation of any environmental law, rule, regulation or bye-law is pleaded. The issues involved are purely relating to town planning. The petition does not even contain

whisper a breach of environment law or rules either in the petition or in the arguments. The challenge must be confined to the ones raised.

. Let us first consider the judgment in Nivara Hakk Suraksha Samiti (supra) and what was in issue and decided there. The petition challenged the Development Control Regulations for Greater Bombay 1991 brought into operation on 25th March, 1991. The first contention raised on behalf of the Petitioner therein was that the Development Control Regulation 1991 are Rules, within the meaning of Section 158 of the M.R.T.P. Act, 1966 and cannot be brought into operation unless they are laid before each House of the State Legislature. That contention was rejected.

. The Second contention which was urged was that Zoning Maps only in respect of 'A' and 'C' Wards had been brought into operation. The Development Control Regulations are applicable to all the zones and without finalising the zoning Maps of all the zones, the Regulation could not be brought into operation. That contention was rejected.

. The third contention urged was that the

Development Control Regulations of 1991 have made major modifications in the Draft Development Rules of 1989. The Court posed to itself a question, as to whether the Regulations as notified which had reached a stage of wholesale rejection or the replacement of the Development Plan considering Section 31 of the M.R.T.P. Act. After considering the material and the provisions of the Act and the Rules the Court held that there was no wholesale rejection or replacement and consequently rejected the contention. The argument on this count was based on the need of infrastructure in the matter of water supply, drainage and sewerage. Contentions were also urged in the matter of height restriction and use of F.S.I. and permitting FSI of 2.5 for the redevelopment of slums. There were also some other challenges on this count. The Court held that it does not amount to insertion of new provisions but are essentially modification to the original draft Rules.

. The last challenge was to the transfer of Development Rights under the Regulation of 1991. The argument raised on this count was that the D.Rs., are negotiable instruments under the Negotiable Instruments Act and in view of Entry 46 in List I of the VIIth Schedule to the Constitution

of India, only Parliament had competence to enact the law. The Court rejected this contention and held that D.Rs., are in connection with the right to develop the land and would be covered by Entry 6 of List III of the VIIth Schedule.

. Though the petitioner in the petition had invoked Article 14 and 21 of the Constitution of India, no challenge on that count was considered and decided.

10. Considering the Ratio decendedi of the Judgment in Nivara Hakk Suraksha Samiti & Ors (supra), the question is whether the petition ought to be dismissed by applying the principles of constructive res judicata.

. In **Forward Construction Co. and ors. V. Prabhat Mandal ((Regd.) Andheri and others and Municipal Corporation of Greater Bombay, with Prabhat Mandal and others vs. Municipal Corporation of Greater Bombay and ors., AIR 1986 SC 391,** the Supreme Court hold considering Explanation VI to Section 11 of the C.P.C., that when the conditions of Explanation VI are satisfied, a decision in the litigation would bind all persons interested in the right litigated and the onus of

proving want of bona fides in respect of the previous litigation is on the party seeking to avoid that decision. The Court was pleased to observe as under :

> "The words"public right" have been added in Explanation VI in view of the new S.91, C.P.C., and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that S.11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation, not by way of a private grievance. It has to be a bonafide litigation in respect of a right which is common and is agitated in common with others."

In that case the challenge in the first Petition was to the user of plot for commercial purposes under the DC Regulations. The challenge in the subsequent petition was also similar. It is in that context that the Supreme Court held that considering Section 11 of C.P.C., and the Explanation, the principles of res judicata would also apply to public interest litigation.

. In **The Direct Recruit Class-II Engineering Officers Association and others v. State of Maharashtra and others, AIR 1990 SC 1607,** the High Court had dismissed a petition under Article 226 of the Constitution, challenging the rules - subordinate legislation, after hearing the matter on merits. The issue was, whether a subsequent petition was maintainable in the Supreme Court under Article 32, on the same facts and for the same reliefs filed by the same parties or would be barred by the general principles of res judicata. Whilst answering the issue, the Supreme Court held that binding character of judgments of courts of competent jurisdiction, is in essence a part of the rule of law, on which the administration of justice, so much emphasized by the Constitution, is founded and a judgment of the High Court under Article 226 passed after hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32.

. In **Rural Litigation and Entitlement Kendra vs. State of U.P., 1989 Supp. (1) S.C.C. 504** the Court declined to apply the rule of

constructive res judicata to a PIL raising issues of public importance on the ground that in a PIL the disputes raised were not inter partes and that constructive res judicata was a technical defence, which could not preclude consideration /determination of such matters. The Court held, that the writ petitions before it were not inter-partes disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazard free environment for the people to live in, mining in the area should be permitted or stopped.

> "We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of resjudicata."

. In **V. Purushotham Rao v. Union of India and ors., (2001) 10 SCC 305,** the issue of constructive res judicata came up for consideration. The Apex Court noted that considering the Explanation to Section 141 of the Code of Civil Procedure, proceedings under Article 226 of the Constitution are excluded from the expression 'proceedings'. Therefore, the Code of Civil Procedure is not required to be followed in a proceeding under Article 226, unless the High Court itself has made the provisions of CPC applicable to the proceedings under Article 226. The Court further noted, that the principles of Section 11 as well as Order 2, Rule 2 CPC, contemplate an adversarial system of litigation where the Court adjudicates the rights of parties and determines the issues arising in a given case. Public interest litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such a case, merely brings it to the notice of the court as to how and in what manner the public interest is being jeopardized by arbitrary and capricious action of the authorities. The Court further noted that even in the self same proceedings, the earlier order though final, was treated not to create a bar, inasmuch as the controversy before the Court was of

grave public interest. After so saying this is what the Court observed :

> "In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override."

. In **Guruvayoor Devaswom managing Committee v. C.K. Rajan (2003) 7 SCC 569,,** the Supreme Court considered the decisions in Forward Construction Co. & in Rural litigation & Entertainment Kendra vs. State of UP and reiterated that "Although procedural laws apply to PIL cases but the question as to whether the principles of res judicata or principles analogous thereto would apply depends on the nature of the petition as also facts and circumstances of the case.

12. Let us refer to some Constitution Bench Judgments, as to the availability of a challenge to a legislation on a legal point not earlier raised before answering the issue. In **The Collector of Customs, Madras and Nathella Sampathu Chetty and another v. Nathela Sampathu Chetty and another, AIR 1962 SC 316,** it was noted by the Constitution Bench of the Supreme Court, that earlier a petition had been filed challenging Section 178A of the Sea Customs Act. The main challenge in that petition was under Article 14 of the Constitution of India. The Court rejected the challenge, that Section 178-A was unconstitutional being violative of Article 14 in **Babulal Amthalal Mehta V. Collector of Customs, Calcutta, AIR 1957 SC 877.** Another petition, thereafter, came to be filed once again challenging section 78A of the Sea Customs Act, under Articles 19(1)(f) and (g). It was argued that such a challenge would not be available, as earlier a petition had been filed and rejected under Article 14. Noting that argument, the Court observed as under :

> "We are, therefore, satisfied that the decision of this Court considered the validity of S. 178-A only with reference

to Art. 14 and that it is not a decision regarding impugned legislation being or not being obnoxious to Article 19(1)(f) and (g)."

The petition ultimately was dismissed. What is however, important to note, is that though it was open to the parties in the previous petition to have raised a challenge to Section 178A on the ground of violation of Articles 19(1)(f) and (g), such a challenge had not been raised. The Supreme Court permitted a challenge to Article 178 A on the ground of violation of Articles 19(1)((f) and (g) in a Second petition. Our attention, was also invited to the judgment in Smt. Somawanti & Ors. vs. State of Punjab & Ors., AIR 1963 SC 151. A challenge was made to the Constitutionality of Section 6 of the Land Acquisition Act under Article 19(1)(f) and 31. Those challenges were negated as the Court observed that the grounds urged for the challenges were covered by earlier judgments. It was then contended that even though the law was protected under Article 31(2) it will still be invalid on the ground that the restriction placed on the right of a person to hold property is unreasonable. The Court observed that though the Court may not have pronounced on this aspect of the

matter, the Court was bound by the actual decision which categorically negatived an attack based on the right guaranteed by Article 19(1)(f). While saying so the Court observed as under:-

> "The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. That point has been specifically decided in the three decisions referred to above."

. Thereafter the issue of constructive res-judicata came up for consideration in Amalgamated Coalfields Vs. Janpada Sabha AIR 1964 S.C. 1013. A Constitution Bench noted that constructive res judicata, which is a special and artificial form of res judicata enacted by Section 11 of Civil Procedure Code should not generally be applied to Writ Petitions filed under Article 32 or Article 226. It may be noted that this was a case in the matter of Tax Assessment. The Supreme court referred to some English Judgments on tax cases and the speech of Lord Radcliffe which noted that in rating cases, the matter comes from Tribunals of

limited jurisdiction. The Supreme Court observed as under :

> "The grounds now urged are entirely distinct and so, the decision of the High Court can be applied only if the principle of constructive res judicata can be said to apply to writ petition under Article 32 or 226. In our opinion constructive res judicata which is a special and artificial form of res judicata enacted by section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226". It may be further stated that in dealing with a situation, whether any law has been declared by the Supreme court, by implication, the court held that such implied declaration, though binding, must be held to be subject to review by the court on a proper occasion when the point in issue is directed and expressly raised by any party before the court.

13. It thus follows, that if a challenge to a legislation, or subordinate legislation , was

rejected as being violative of a particular article of the constitution, it is still permissible to permit a challenge under Part III of the Constitution, if those Articles had not been invoked while challenging the earlier petition or even if invoked had not been considered and decided in the earlier petition. In some cases, even a challenge on new grounds may be available, if these grounds had not been urged and decided even considering the plea of constructive res judicata on the ground of public interest. It is only in those cases, where the subject matter is the same and the first petition was filed bonafide, that the principles of res judicata including constructive res judicata or analogous principles may be applied, bearing in mind what the Supreme Court has noted about applicability of procedural laws, in Amalgamated Coalfields (supra), U. Purshottam Rao (supra), and Guruvayoor Devaswom Managing Committee (supra), especially public interest. The challenge in this petition is to the validity of the Regulations on the ground that it affects the quality of environment and consequently the right to life of citizens already staying in the area, as the Petition was first filed and as now amended on the ground of absence of infrastructural facilities. Considering the ratio in Amalgamated

Coalfields (Supra), V. Purushotham Rao (supra), Guruvayoor Devaswom (supra) we do not think that the Judgment of this Court in Writ Petition No. 963/1991 decided on April, 1999 will attract the principles of constructive res judicata to dismiss this petition on that ground. The challenge in that petition for violation of fundamental rights in so far as DC Regulations is concerned, was a limited challenge as can be seen from the facts of that case and the judgment of this Court.

. We are clearly, therefore, of the opinion that though the principles of res judicata or constructive res judicata can be extended to PIL petitions, however, considering the nonadversial character of PIL Litigation when the issue is between public interest and private interest, the public interest must prevail. If the challenge rests on violation of fundamental rights which was not earlier raised or raised but not answered in the previous petition or on a new ground not raised earlier it will still be open to this Court to entertain such a challenge. The law as to a challenge to a legislation in public interest litigation would require that if a challenge is made to a legislation on the ground of violation of fundamental rights and such a challenge was not

raised in the earlier petition and if raised not answered and or even on a new ground not raised earlier, considering the test of public interest, it will be still open to the Constitutional Court, to entertain a fresh petition challenging the legislation as being violative of fundamental rights. The principle of Res -Judicata ought not to be a weapon in the hands of a put up or ill informed petitioner to prevent a Constitutional Court from examining the real issues in controversy likely to affect ecology and environment or the fundamental right of a deprived section of society unable to ventilate their rights.

DELAY, LACHES AND ACQUIESCENCE:

14. The Counsel for the respondents have also urged that the petition be dismissed on the ground of delay, laches and acquiescence. The learned Advocate General was pleased to submit that the petitioners had given absolutely no explanation for the enormous delay and an explanation was a must. Relying on the judgment of **Bombay Dyeing and Mfg. Co. Ltd., and Bombay Environmental Action Group - (2005) 5 SCC 61,** it is submitted that the petition is liable to be summarily dismissed. It is pointed

out that use of TDR has been permitted to be used since 1991 generally and in the corridors since 1997. A large number of citizens, the planning authority and the State, have acted upon the said DCRs and have implemented or are either in process of implementing or planning projects based on that. Large amounts of moneys have been spent on clearing slums and acquiring slum TDR certificates on the footing that the same can be utilised in the corridors. If those who have been granted TDR or purchased TDR after 1997, almost for six years knew that TDR generated from slums can not be utilized in corridors, it is possible that certain slum rehabilitation schemes would not have been started so as to generate slum TDR. It has also to be seen in the perspective that all development plans have a limited life span of 20 years (Section 38 of MRTP Act). The period of this plan is substantially over and before the next development plan is sanctioned, a comprehensive review will take place of all these policies. The ban on the use of TDR in the corridor area was removed in the year 1997. Considering the scheme of the MRTP Act, public notices in respect of these modifications were duly published in the year 1995 and 1997 respectively. Objections/suggestions were obtained from the public and a public hearing was given by the Deputy

Director of Town Planning. It was only thereafter that DCR was amended. The entire process, therefore, was fair, open and transparent. The petitioners did not file any objections or make any suggestion during the course of finalising the plan under Section 37. The petitioners have not taken any objection in response to the public notice or the public hearing. The petitioners have, therefore, waived their right to object to or assail the modified/amended DCR. Subsequent to the notification, utilisation of TDR on properties in the suburban areas has been openly carried out. There is, therefore, inordinate delay of six years in filing the present petition which has not been explained. Petitioner No.2 himself is a Builder who was aware of the use of TDR in the corridors.

. In **Printers (Mysore) Ltd., vs. M.A. Rasheed & ors. 1004(4) SCC 460,** the Supreme Court was pleased to observe as under :

> ".....the writ petition should not have been entertained keeping in view the fact that it was filed about three years after making of the allotment and execution of the deed of sale. The High Court should have dismissed the writ petition on the

ground of delay and laches on the part of the first respondent."

. In **Narmada Bachao Andolan vs. Union of India & ors. 2000(10) SCC 664,** the Supreme Court has held that :

"Any delay in execution of the project means overrun in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioners could have approached the court at that time. Just because a petition is termed as PIL does not mean that ordinary principles applicable to litigation will not apply, Laches is one of them."

. In **Madhya Pradesh vs. Bhailal Bhai, AIR 1964 SC 1006,** the Supreme Court has observed thus :

"that the provisions of Limitation Act do not as such apply to the granting of relief under Art. 226. It appears to us however that the maximum period fixed by the legislature as the time within which

> the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable."

In Bombay Dyeing and Mfg. Co. Ltd. (supra), the Supreme Court was pleased to observe as under :

> "27. The Courts are also required to consider the decisions of this Court relating to public interest litigation vis-a -vis reason of delay in bringing the same as noticed by this Court in **Chairman & MD, BPL Ltd. v. S.P. Gururaja in the following terms : (SCC pp. 588-89, para 32).:-**
>
> "32. In the facts and circumstances, we do not find that the Board and the State had committed any illegality which could

have been a subject-matter of judicial review. The High Court in our opinion committed a manifest error insofar as it failed to take into consideration that the delay in this case had defeated equity. The allotment was made in the year 1995. The writ application was filed after one year. By that time the Company had not only taken possession of the land but also made sufficient investment. Delay of this nature should have been considered by the High Court to be of vital importance."

15. Our attention is invited to the following material on record :

(a) 468 projects were sanctioned by the S.R.A. as on 1.4.04;

(b)Large number of plots were declared by the SRA as difficult plots needing development by Rehabilitation Scheme;

(c)Various items of infrastructure were added by the BMC by resorting to TDR provisions;

(d)Various plots were made available;

(e)General Rehabilitation Scheme was framed in 1998 as a planning measure under the Slum Clearance Act;

(f)A number of plots which were reserved were acquired;

(g)A large number of amenities were made available.

(h)Infrastructure development proposed;

(i)Large areas designated where TDRs cannot be used.

Apart from that, it is also submitted that the petition is based on documents which consist mainly of correspondence and newspaper cuttings of the period 2000-2001. The petition is declared on 26.2.03 though filed much later. The second petitioner is not an ordinary citizen. Petitioner No.2 is a builder and developer who is familiar with the trade of construction/development, including the use of TDR and was aware in much

greater detail of the infrastructural requirements of the suburbs and the burden put on them by allowing the use of TDR upto a maximum of 2. It is not possible to accept that the petitioner was unaware of the allegations which he has now chosen to make. Inspite of that he sat back and watched development proceed on the basis of the DC Regulations 1991, 1995 and 1997 Amendments and when third party rights have been created. Reference is made to the averments by the petitioner in his affidavit dated 10th August, 2005 wherein he has asserted as under :-

> "I say that I cannot be a dumb spectator where the city's planning, execution, living condition,environment and disaster management is at state:.

The petition has been entertained as a P.I.L. and raises issues of considerable public importance, for the inhabitants of the Suburbs of Mumbai. The present petition impugns the Constitutional validity of DC Regulation No.34 and Appendix VII-B as being ultra vires Articles 14 and 21 of the Constitution of India. In the case of **Ramchandra vs. State of Maharashtra (1978) 1 SCC 317,** the Court entertained a petition, challenging the vires

of rules after 10 or 12 years and rejected the objection on the ground of delay and laches on the ground that:

> "We do not think this contention should prevail with us. In first place, it must be remembered that the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition. Each case must depend on its own facts".

> "Moreover, what is challenged in the petition is the validity of the procedure for making promotions to the posts of Deputy Collector-- whether it is violative of the equal opportunity clause __ and since this procedure is not a thing of the past, but is still being followed by the State Government, it is but desirable that its constitutionality should be adjudged when the question has

come before the Court at the instance of parties properly aggrieved by it."

"Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the qui vive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like".

. In the case of **Lohia Machines vs. Union of India (1985) 2 SCC 197 at page 225** the Supreme Court (Constitution Bench) held that:

"It is undoubtedly true that merely because for a long period of 19 years, the validity of the exclusion of borrowed moneys in computing the 'capital employed' was not challenged, cannot be a ground for negativing such challenge if it is otherwise well founded. It is settled law that acquiescence in an

earlier exercise of rule-making power which was beyond the jurisdiction of the Rule-making authority cannot make such exercise of rule-making power or a similar exercise of rule-making power at a subsequent date, valid. If a rule made by a rule-making authority is outside the scope of its power, it is void and it is not at all relevant that its validity has not been questioned for a long period of time, if a rule is void it remains void whether it has been acquiesced in or not. Vide Proprietary articles Trade Association v. A.G. For Canada & A.G. For Australia vs. Queen."

16. The petition directly impugns the Constitutional validity of D.C. Regulation 34 and Appendix VII-B as being ultra vires Articles 14 and 21. Accordingly it is submitted that the petition should be decided on merits notwithstanding the delay. It is, however, submitted by the learned Amicus, that parties who had acquired slum TDR and had submitted plans to the B.M.C., for construction using Slum TDR in the Corridors, prior to the interim order of 2004, should be allowed to proceed with their construction, even if this Honourable

Court quashes appendix VII-B. It is submitted that this is the only category of cases that should be excluded. Developers/Builders undertaking Slum Rehabilitation Projects are not similarly prejudiced in as much as Slum TDR could be utilized outside the said corridors - in fact the record establishes that 84% of the Slum TDR generated to date has been utilized outside the said corridors. Similarly those given TDR as compensation for DP reservations or given Slum TDR as incentive for undertaking Slum rehabilitation projects can utilize such TDR outside the four congested/overcrowded suburban wards, HE, HW, K/E and L. The Petitioners are not in agreement with this concession made by the learned Amicus Curiae.

. We do not propose considering the issues of public importance which have been raised to dismiss the Petition on this count. The contention however will have a bearing on the reliefs, if any, which can be granted in this petition.

17. **MALAFIDES AND LOCUS OF THE PETITIONERS:**

. It has been submitted that the second petitioner is a builder who is residing in a building constructed by use of TDR in Deepak Villa,

Vallabh Nagar Society, J.V.P.D. Scheme, Mumbai. The petitioner having taken advantage of T.D.R. is, therefore, estopped, from challenging DCR 34. The petition, is really and in effect to settle personal grievances, after petitioner No.2 had failed to get advantage of the Slum Regulation Scheme. The petition masquerades as a public interest petition but really is also a private interest petition filed for malafide and ulterior motives. The second petitioner, is a builder by profession and is personally and vitally interested in release of TDR which is the subject-matter of the petition. The entire object of the petition is to manipulate the prices of properties in different parts of the city, to the benefit of the second petitioner and to the detriment of the respondents and others who are similarly placed. As a result of the use of TDR in the corridor areas, prices in the western suburbs have fallen substantially, since there was increase in the housing stock which hurt the commercial interests of the builders, such as the second petitioner who directly stands to gain from an embargo on development in the corridor area, since it would lead to increase in property prices in the western suburbs where the second petitioner has business interests. The second petitioner is a partner of a firm by name 'La

Builde Associates' which carries on business as builders and developers and claims to have executed several projects in suburban Mumbai. This is apparent from the material on record in Writ Petition No.1080 of 2003 (La Builde Associates v. State of Maharashtra). That petition pertained to a consensual agreement for acquisition of land at Anik Village, Chembur by MHADA for PAP in implementation of the MUTP Scheme against grant of TDR. The tender of one Rockline Construction was accepted. The petitioners challenged the award of the contract of Rockline Construction claiming superior rights and were thus entitled to the award of the contract. From the record the petition appears to have been declared on 26th February, 2003, the same was filed in the Court and moved only after the earlier petition W.P. 1080/2003 filed by the petitioners, was dismissed on 28.4.2003. It is, therefore, set out that if the second petitioner had succeeded in that petition, he obviously would not have filed the present petition. It is apparent from the facts that the second petitioner after having failed to secure the benefits of the TDR now has made this attempt to challenge the same purportedly in public interest and to benefit himself in his capacity as a builder in the western suburbs. The motive in filing the

present petition is clearly oblique and malafide and in any event, the aforesaid facts ought to have been disclosed to the Court in the present petition. The petition is a gross abuse of the process of the Court and ought to be dismissed with compensatory costs. Reliance is placed on various judgments wherein the Apex Court has deprecated the practice of parties seeking to attain private interests in the garb of a public interest petition. Reference is made to the judgment in **S.P. Anand vs. H.D. Deve Gowda, [1996] 6 SCC 734; Raunaq International vs. I.V.R. Construction Ltd., [1999] 1 SCC 492** and S.P. Gururaja (supra). It is pointed out that in reply filed in sur-rejoinder the petitioner has admitted about the filing of the previous petition, but has not disclosed as to why he suppressed this fact from the Court. Petitioner No. 2, however, points out that the present petition was filed in February,. 2003 and came up for admission on 13th March, 2003 when it was converted into a PIl Petition. The other petition, namely W.P. 1080 of 2003 was lodged on 4.4.2003 and was disposed off on 28.4.2003.

. This contention could have been examined. However, considering that this Court has

entertained the petition as a P.I.L. and also appointed Amicus Curiae to assist the Court and heard the matter on merits and another P.I.L. on same or similar points was pending, being P.I.L. Writ Petition No.283 of 2005, we are not inclined to reject the petition merely on this count.

18. The challenges as now crystalised by the learned Amicus Curiae are to-

1. D.C. Regulation No.34 which in effect doubles the FSI throughout the suburbs from the prescribed 1.00 to 2.00 by the use of Transferable Development Rights (TDR issued by the MMC/Plannning Authority of the lands reserved for gardens, roads and other Development Plan reservations .80 & Slum TDR .20) while restricting the use of such TDR in the Island City.

2. Appendix VII-B which doubles the FSI in the three Railway Corridors from the prescribed 1.00 to 2.00 by the use of Slum TDR (TDR issued against projects for slum rehabilitation) while continuing the prohibition on the use of Reservation TDR in the said three Corridors, as being ultra vires Article 14 and 21 as they are arbitrary, malafide, unreasonable and

discriminatory.

19. Before dealing with the challenges we may briefly consider some aspects as pointed out by the learned Advocate General on behalf of the State of Maharashtra.

T.D.R. Policy:

(a) The TDR policy is contained in Section 9(a) and Section 126 of the MRTP Act, 1966 which enables compensation to be given in the form of TDR. There is no challenge to the vires of these provisions;

(b) TDRs were conceived of as an effective tool for acquiring lands for utilities, amenities, playgrounds, recreation grounds, etc. since the Draft Development Rules of 1984. The D'Souza Committee (1987) recommended the use of TDR and this eventually was reflected in the Development Control Regulations, which came to force in March 1991, albeit with some modifications;

(c) The DCR 1991 forms part of the sanctioned Development Plan under section 22(m) of the MRTP Act. Hence these Regulations permitting TDR have been in force since then and are due for revision

at the end of 20 years.

(d) These Regulations were enacted after a full consultative process spread over several years; had been the subject of different committees, discussions, debates and were sanctioned after following the statutory consultative process under the MRTP Act, 1966;

(e) The validity of the DCR, 1991 had been challenged on various grounds in 1991 and the challenge was repelled by a reasoned judgement by a Division Bench of this Court.

(f) There is an absolute cap or ceiling of 2 on the total FSI (including TDR) which can be loaded in the suburbs. In no event can this be exceeded;

(g) The average existing consumed FSI in the island city is in excess of 3. In Marine Drive it is 2.66, in Nariman Point it is 4. In comparison the population densities as reflected by the Census statistics for the Suburbs show that on an average the population of the Suburbs per sq. km. is less than that of the island city;

(h) 65 lac people live in the slums. Hence the

Load on the infrastructure is already in existence. By clearing the slums the load is not being increased;

(i) 16,40,048 sq. meters of land for parks, gardens, playgrounds and recreation grounds has been cleared by applying the TDR provisions in the DCR between 1991 and 2004;

(j) No material is placed by the Petitioners to establish migration of TDR from the Eastern to the Western Suburbs. The rapid growth of the extended eastern suburbs i.e. Bhandup, Mulund etc. is evidence to the contrary.

CORRIDORS:

(a) There is no authoritative study which establishes congestion in the 3 corridors;

(b) The D'Souza Committee (1987) stressed on Special Railway Station Zones being developed. It did not study or suggest a prohibition on utilizing TDR in the corridors but merely said they would remain closed.

(c) The area of the 3 corridors in sq. mts. is :

i. Between Western.Rly.

and S.V. Road 81,43,500

ii. Between W .Rly and

Western Exp.Highway 1,80,77,100

iii.Between Central Rly.

and LBS Marg

(Eastern Suburbs) 1,03,58,000

Total *3,65,78,600*

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(d) Slum TDR utilized in these 3 corridors is 1,06,015, 229,909 and 82,631 respectively.

(e) The TDR utilized is 1.30%, 1.27% and 0.80% respectively of the total area of the corridors.

(f) Out of 25,76,251 sq. mts. of slum TDR generated only 418,255 sq.mts., has been utilized in the corridors.

(g) Slum Clearance in the corridors on government lands has resulted in re-housing 90,000 slum dwellers, implementation of 23 schemes for public

purposes and 99 schemes for rehabilitation.

(h) The Afzalpurkar Committee after due study recommended utilizing slum TDR in large parts of the corridors.

(i) The Government after due deliberations and consultation and following the statutory public consultative process permitted slum TDR to be utilized in the entire length of corridors in 1997 i.e. about 9 years ago.

(j) Since August 2004, the loading of TDR on existing buildings by putting up columns in the marginal open space is prohibited. Thus existing buildings will continue as they are without TDR being loaded.

(k) The entire Development Plan and the TDR policy are all due for review at the end of 20 years when the next Development Plan will have to be brought into force.

20. On behalf of other Respondents it has been submitted as under:-

. The Maharashtra Regional & Town Planning

Act, 1966 ("the MRTP Act") has been enacted by the State Government under its powers to make provisions in relation to Land & Social Planning as per Schedule VII - Item 18 of List II and Item 20 of List I II which specifically empowers the State Government to enact laws and make provisions in this regard. (Maneklal Chhotalal & Ors Vs. M.G.Makwana & Ors AIR 1967 SC 1373).

. The framing of the Development Control Regulations ("DCR") and/or amendments thereof are legislative functions. The legislative power of framing and/or amending the DCR is delegated to the State Government and Section 37 of the MRTP Act permits the State Government to make necessary modifications and/or amendments to the DCR. (Pune Municipal Corporation & Anr. V/s. Promoters and Builders Association & Anr. Reported in (2004) 10 SCC 796).

. These DCR are Regulations under the MRTP Act and are delegated legislation. It is settled law that the Regulations made under the statute have the efficacy of the statute i.e. as if the same have been enacted specifically under the MRTP Act. It is submitted that these Regulations made under the MRTP Act must be treated for all purposes

of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act. The Regulations, therefore are to be judicially noticed for all purposes of constructions and obligations and shall have the same effect as the provisions of the MRTP Act whereunder they are made. (State of U.P. & Ors. v/s. Babu Ram Upadhya reported in AIR 1961 S 751). Maxwell on interpretation of Statute, 10th Edition states:-

> "Rules made under a statute must be treated for all purposes for construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation."

21. We may note, that some of the grounds for a challenge to a legislation are the following:-

(a) The competence of the legislature to enact the impugned legislation;

(b) For violation of fundamental rights guaranteed by the Constitution.

(c)In case of a delegated legislation such as DCR, the same can be challenged on an additional ground i.e. the same is beyond the scope of the parent Act under which the Regulation / Rule is framed.

(d) Under our Constitutional jurisprudence, a legislation or a rule cannot be challenged on the ground of non application of mind i.e. that certain relevant factors and/or certain consequences which ought to have been considered, have not been considered by the legislature. There is a presumption in law that the legislature in its wisdom has considered all relevant factors that are required to be considered.

(e)There is a presumption of constitutionality and the burden is upon those who challenge the enactment to show that there has been a clear transgression of constitutional principles. Courts assume that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience. The legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. (**Ram Krishna Dalmia**

v/s. Justice Tendulkar reported in AIR 1958 S.C. 538).

22. Let us now briefly consider the challenges as formulated by the petitioners. It may be noted that though in oral arguments and written submissions advanced on behalf of the petitioners learned Amicus Curie has sought to make reference to the position of non-use of TDR in the Island City on the ground of Congestion/over crowding, in the petition there are no specific pleadings. However, reliance is placed on the replies filed by the Respondents and the material on record in support of that challenge.

. The learned Amicus Curiae has set out the legislative determinations/premises, which are reproduced below:-

(i) Transferable Development Rights (TDR) issued against surrender of land reserved in the Development Plan for roads, gardens and other public purposes and even Slum TDR, are not permitted to be utilized in the Island City - having regard to the fact that the Island City is congested/overcrowded. DC Regulation 34 in effect classifies Mumbai City into two areas:-(a) The

Island City, where TDR is not permitted to be used, on the ground that these wards/areas are overcrowded/congested and (b) The Suburbs where TDR can be utilized to double the FSI from the prescribed 1.00 to 2.00.

(ii) The FSI prescribed for the suburbs (which is necessarily linked to the carrying capacity) is fixed even today at 1.00 - but the use of TDR allows the FSI throughout the suburbs to be doubled from the prescribed 1.00 to 2.00.

(iii) TDR from any source (i.e. DP Reservation TDR or Slum TDR) was till 1997 not allowed to be used in the three Suburban Railway Corridors, as they are congested/overcrowded as in the case of the Island City.

(iv) That post 1997, the amended Appendix VII-B permits the doubling of the FSi in the three Suburban Railway Corridors from the prescribed 1.00 to 2.00 by the use of slum TDR (TDR issued as incentive for undertaking Slum Rehabilitation Projects under DC 33(10). However, the legislative determination that such areas continue to be congested/overcrowded is not altered, in asmuch as even today the prohibition against the use of DP

reservation TDR (TDR generated against surrender of gardens, road and public reservation areas) in the said three corridors continues. The justification offered for the classification/exclusion of Slum TDR from the prohibition earlier imposed was that "This was so as otherwise no one would be willing to undertake SRA Scheme in the Island City."

2. **The fact that infrastructure in Mumbai City (i.e. water supply, parks/recreation areas, roads, trains, sewerage, etc.) are already grossly inadequate/overstrained.**

(a) **Water supply:** Mumbai requires 3900 of water. It presently gets 3050 MLD i.e. a shortfall of 850 MLD. Most areas get water for only a couple of hours each day. Moreover the BMC has issued public statements that it cannot give water connections to fresh constructions till 2007. The BMC affidavit in fact accepts that as against the norm of 135 litres per person per day in buildings, it is only supplying 90 litres per person per day. This water shortage is expected to continue till 2021.

(b) **Open spaces/recreation grounds:-** Mumbai has a chronic shortage of open/recreation space parks. The norm adopted by the United Nations Development

Agency is 4 acres per 1000 population. Even including unlisted parks, gardens, beaches and promenades, on the basis of a population of 14 million, the open space available per thousand population is only .088 acres. If the open areas occupied by slums are excluded the figure drops even lower to 0.03 acres per 1000 population. In contrast Delhi, Chennai and Calcutta have approximately 4 acres of open spaces per 1000 population and New York and London have 10 acres and 7 acres respectively per 1000 population.

(c) **Congestion/population density:** Many suburban wards/areas are more congested/overcrowded than some Island City wards. The population density (population per sq.km.) in suburban wards W/H (Bandra) 51,275 and Ward L (Kurla) 58,512, exceeds the average population density of the Island city: 48,581. Moreover even in absolute terms the population density in suburban wards W/H Bandra and L Kurla exceeds the population density in Island City wards A (18,628), B (48,247), F/N(34,182) and G/S (49,723). Similarly the population density in suburban ward H/E Khar-Santa Cruz (44,778) exceeds the population density in City wards A, F/N and G/S and the population density in suburban ward K/E (Andheri (34,336) exceeds the population density of

City Ward A.

(d) **Roads & Vehicular Pollution:** The present vehicular density is 70 vehicles per km. of road and the extent of congestion/road inadequacy can be gauged from the fact that over the past decade the speed of BEST buses has decreased from 21 kms/hr. to only 12 kms./hr. A study conducted by the MMRDA through the NEERI found the highest levels of vehicular pollution in the suburbs. Bandra, Vile Parle, Santa Cruz, Jogeshwari and Malad. The MMRDA stated that "the ever growing vehicular and passenger demands coupled with constraints on capacity augmentation of the existing network, have resulted in chaotic conditions during peak hours.

(e) **Local Trains:** The local train system has a design capacity of 852 passengers for a 9 car rake and 1136 passengers for a 12 car take. During peak hours the number of passengers are 3400 for a 9 car rake and 4540 for a 12 car rake, approximately 4 times its design capacity. The MMRDA states that even after the MUTP project is completed in 2011, a local train will still continue to carry 3000 passengers, as against its design capacity of 1136 passengers. As stated above, the MMRDA refers to conditions during peak hours as being "Chaotic".

(f) **Sewerage:** As per the BMC web site only 65% of the population is connected to underground sewers. Moreover of the 3116 mld of sewage, only 436 mld gets either full or preliminary treatment and approximately 85% is discharged into the sea or creek.

(g) The chronic inadequacy of the infrastructure/civic amenities has been noted/recorded by this Honourable Court in its judgment in the case of J.B.D'Souza & Ors. vs. State of Maharashtra, reported in (2005) Vol. 107(4) Bom.L.R.565 at para.2 page 569 this Court has noted that "There is a serious burden on the existing infrastructure, something which neither the State nor the Municipal Corporation disputed before us. Every index of civic amenities such as water, waste disposal, transport and health care is under a severe strain under the weight of population. Open spaces are woefully inadequate, spaces for recreation are a mirage for the young and elderly."

23. In order to consider the nature of the challenges, we may refer to some developments in the framing of D.C. Regulations, 1991, Heritage

amendment in 1995 and the 1997 Slum Rehabilitation Amendment.

The DC Regulation 1991:

i. 13th January, 1977: The BMC, which is the Planning Authority under the Maharashtra Regional and Town Planning Act, 1966 ("the MRTP Act"), declared its intention to revise the Development Plan for the City of Mumbai.

ii.During the next six years the work of revision of the Development Plan and the Development Control Rules took place. Various High level Committees like Housing Policy Committee, Land Policy Committee etc. assisted in preparation of the draft Development Plan. Eminent town planners and other persons with required expertise were a part of such committees.

iii.26th May, 1983: The BMC published the draft Development Control Rules. By a separate notification of the same date it also published the draft Development

Plan for the "Island City" i.e. of Municipal Ward A to G.

iv.13th April, 1984: The BMC published the draft Development Plan for the suburban wards, i.e. Wards H to T.

v.Thereafter the BMC invited objections and suggestions to the aforesaid draft Development Plan and Development Control Rules.

vi.30th March, 1985: After considering the objections and suggestions received by it, the BMC submitted a draft Development Plan for Wards A to G to the GOM.

vii.30th April, 1985 and April 1986: The BMC separately submitted the draft Development Control Rules and the draft Development Plan for Wards H to T to the GOM for its sanction.

viii.5th September, 1986: The G appointed an Advisory Committee under the Chairmanship of Mr. J. B. D'Souza to

examine the draft Development Plan as also the draft Development Control Rules so submitted by the BMC.

ix.7th July, 1987: The Advisory Committee submitted its report on the draft Development Control Rules.

x.21st August, 1987 The Advisory Committee submitted its report on the draft Development Plan. The D'Souza Committee Report on the draft Development Plan 1981 to 2001 inter alia stated as follows:

"4.03 Nearly as good an example of the perverse effect of unrealistic standards is the First Development Plan's excessive freeze of land under reservations for amenities that could well have been developed by private effort and investment. The Corporation's chronic inability to take over and develop such plots because of the squeeze on its resources kept them vacant because the owners too could not use them. It made them a target for slum settlement.

4.05 Our Committee is convinced that a less extravagant choice of standards and a more realistic approach to land use allocations in the first plan would have assured Bombay's citizens, and particularly its poor, of a far better environment and a much greater access to amenities than now exists. It is with this conviction that it has treated the Corporation's proposals.

4.10 The Committee's view on residential densities has already been mentioned above. The ceiling on densities in the First Plan, and those in the draft of the Second, have an effect, even if that was not intended, of inhibiting affordable housing for the poor, as well as of preserving for gracious living certain parts of Bombay, into which even middle class citizens might not intrude. We have opted instead for a uniform maximum density of 350 dwelling units per net hectare (except in areas where the FSI is below 1.0). We go beyond this in certain areas, including those intended for

Public Housing, where densities may have to be even higher so that small enough housing units may come up to house the poor. Here we stipulate that density must exceed we add an incentive FSI of 20 per cent for attaining a 450 level. We are conscious of the reception that this will receive from upper class critics, but are confident that concern for the under privileged will prevail over bourgeois policies that have effectively kept housing beyond the reach of the poor.

6.10 What is even worse, there are large variations in the density prescriptions as between the island city and the suburbs and again within the island itself. These lead to an exclusion of the poor from certain localities, a discrimination that the framers of the Rules may not have intended and which is in any case indefensible.

6.12 One valuable feature of the present Development Control Rules is the exceptionally high density (400) and

Floor Space Index allowed to MHADA Projects for economically Weaker Sections and Low Income Group Housing. This was a sensible concession introduced into the Rules in 1982, but made too small a dent on the low income housing. This was a sensible concession introduced into the Rules in 1982 but made too small a dent on the Low Income Housing problem because it was confined to MHADA Projects, Impressive, as it is otherwise may be, MHADA's contribution to the annual housing output in Bombay is not much more than 10 per cent. We believe that an offer of FSI-Density incentives will attract private initiative into Low Income Housing Programs. We therefore recommend a new designation category PH/HD (Public Housing/High Density) which will require a minimum density of 325 units per hectare. A bonus FSI of 20% should also be offered for attainment of a 450 - unit density.

6.18 The BMC's draft rules did include the concept of Transfer of Development Rights, but our Committee seeks to widen

their application. A word is necessary to explain the concept.

6.19 Even though the am reservations/ designations of land in the plan generally fall short of the Planning standards, their acquisitions will severely strain the BMC's resources. In fact, the resource constraint was a major reason why the earlier plan remained largely on paper. In the light of that experience it would be difficult for government to ignore Section 31 (5) of the MRTP Act and sanction the new Plan.

6.20 The BMC proposes to separate the development potential of a plot of reserved land from the land itself and let the owner use that potential elsewhere if he has surrendered the land to the Corporation. This proposal offers Government an escape from the dilemma explained in the last para. The proposal has two other plus points as well:-

(a) It evens out some of the discrimination that a Development Plan

inflicts between those whose land is reserved and other land owners.

(b)It reduces the tendency of affected land owners to pressure Government and the BMC for a removal of the reservations under Section 37 of the Town Planning Act.

6.21 Our Committee has slightly amended the proposal the Corporation made. The draft it has submitted to Government allows the Transfer of Development Rights from the Island City to the suburbs and from a plot in the suburbs to another plot northward of the reserved land. The scheme is thus a total reversal of the "Floating FSI" device, which operated against Bombay's interest and earned the Corporation and its Commissioner so much opprobrium.

6.22 The Development Rights will accrue to a owner of the plot reserved for BMC use after he has surrendered it free of encroachment. He will then get Development Right Controls (DRCs) giving

him an F.S.I. credit which he can either use himself or transfer to anyone else. The use of DRCs on any single plot, will however be limited to an FSI of 0.4 over what is normally permitted on that plot. This confines FSI to the same limit as obtained in the old DC Rules, where it applied to road and surrendered by the land owner.

6.23 The Transferability of Development Rights is likely to have a major impact on the implementation of the Development Plan, because many land owners will opt to rescue from a reserved plot its development potential instead of waiting for years till corporation finds the resources to pay for it. On the other hand, the scheme suffers from an important flaw: it does not discriminate qualitatively from an acre of reserved land in Bombay's Fort area and one in, say, Kandivali. Despite the vast difference in value both earn the same DRCs on surrender. The Committee gave this defect a great deal of thought but could not find a finer-tuned solution

that would be convenient to administer and immune to attempts to corrupt it.

6.24 The concept of Transferable Development Rights offers possible solutions to other types of difficulties as well and we have tried to deal with two of them.

6.25 First, the rapidly decaying housing stock, particularly in the island city. Thanks to the Rent Control Law and the permanency it confers on a tenancies at absurdly low rental level, the city's housing stock is deteriorating apace. The Bombay Housing and Area Development Board and its predecessor, the Building Repair Board, have at the peak of their performance treated no more than a fraction of the houses that required their attention. In fact, the gap between the number decaying houses and the number likely to get BHAD treatment is growing. The Committee suggests that a private effort should be attracted to this problem by the offer of a Development Rights incentive. If a

landlord is prepared to rebuild an old building and have in it the present occupants, he should be encouraged to do so by the offer of Development Rights which he can use in the same way as if his land were subject to reservation.

6.26 Exactly, the same facility is proposed for owners of plots that are covered by hutment slums.

6.27 Subject to structural safety and to conformity with parking space stipulations etc., Development Rights may also be used for additional building in plots that are already built up.

6.28 The zones near the suburban railway lines etc., which the Corporation wanted closed to the exercise of these rights will remain so closed.

6.31 Sixth, our draft recognizes the strategic importance of the railway station precincts in the suburbs. It seeks to promote collective and integrated redevelopment by groups of

land owners in these precincts rather than encouraging individual developers to intensify the congestion they now suffer. To this end, the draft uses section 13 of the Bombay Metropolitan Region Development Authority Act, and subjects development in these areas to a B.M.R.D.A. control. That Authority will have to be asked to propose guidelines for such collective redevelopment. Our proposal is set out in Appendix B.

6.34 No Development Zones will very probably be overrun by slums unless land owners have some reason to protect them. Our draft permits certain restricted activities in these Zones.

8.10 Secondly, we propose that instead of large areas being frozen for Public Housing, to be taken up for development only when a public authority gets around to them, private owners should be encouraged to serve nearly the same income classes that MHADA professes to do so, by prescribing high density development and an incentive FSI for

really small tenements. We do recognise that there will be a tendency to circumvent these prescriptions by considering two small tenements into a single medium sized apartment after the Occupancy Certificate is secured. We have proposed certain provisions to discourage this tendency and believe resort to this expedient will be marginal. Our proposals in regard to density and the Transfer of Development Rights have been explained in the Chapter on Development Control Rules.

Appendix B: Development near railway stations.

2. As the draft Development Plan takes no cognizance of this serious problem, it is necessary to search for a flexible system to evaluate building proposals. We now recommend -

(e) that BMRDA should permit an incentive FSI upto 1.7 in lieu of the areas required for public purposes."

xi.14th December, 1989: The GOM issued a notice in the Official Gazette inviting objections and suggestions in respect of the draft Development Control Rules which were proposed to be modified in light of the reports submitted by the Advisory Committee. The draft Development Control Rules were annexed to the notice.

xii.Simultaneously, an Officer was appointed by the State Government to hear the objections and suggestions received from the public and to submit his report. The Officer so designated was the Deputy Director, Town Planning.

xiii.Pursuant to the notification of 14th December, 1989, approximately, 120 suggestions and/or objections were received and considered by the designated officer. Before submitting the report to the GOM, the designated Officer gave a hearing to all the parties concerned;

xiv.July 1990- February 1991: On receipt of the report of the designated Officer the GOM appointed a high level Committee

of Secretaries to the GOM under the Chairmanship of the Chief Secretary to consider the report of the designated officer. The other members of the Committee were the Secretaries of Education, Housing, Law, Industries and Technical Education and Mr. D. T. Joseph, Secretary, Urban Development Department, who acted as the Presenting Officer of the Committee. The Committee had approximately 31 sittings between July, 1990 and February, 1991 on the draft Development Control Rules/ Regulations. The Metropolitan Commissioner, Mumbai Metropolitan Regional Development Authority and the Municipal Commissioner were also consulted.

xv.25th March, 1991: It is after complying with the aforesaid comprehensive procedure that the DC Regulations for regulating the planning, coordinating and development of the city of Mumbai, came into effect and operation from 25th March, 1991, by way of Notification dated 20th February, 1991.

The DC Regulations as originally sanctioned prohibited the use of Transferable Development Rights ("TDR") in the form of Floor Space Index ("FSI" available under Development Rights Certificate ("DCR") in amongst others, the aforesaid three zones.

23. **Heritage TDR:**

1. 22nd September, 1991: A Notification was issued by the Government under Section 37(1) of the M.R.T.P. Act, inviting objections and suggestions in respect of a proposed modification to the D.C. Regulations, whereby D.C. Regulation 67 and Appendix VII-A to D.C. Regulations under D.C. Regulation 67 (Heritage TDR) were proposed to be allowed.

2. 21st April, 1995: By Notification dated 21st April, 1995, Regulation 67 and Appendix VII-A was added to the DCR thereby providing for grant of TDR in respect of heritage buildings.

The conservation and protection of heritage buildings is a matter of planning. In fact, these modifications are done with a primary object of conserving and preserving the overall heritage of the city and for effective implementation of this objective, the concept of "Heritage TDR" was introduced with a view to compensate the owner of the heritage property. The Notification dated 21st April, 1995 introducing Regulation 67 and Appendix VII-A is, therefore, closely linked and has a direct nexus with the objective of the M.R.T.P. Act as these modifications are aimed to preserve and promote heritage buildings which are closely linked to social and economic planning.

(b) In view of the above, the Notification dated 21st April, 1995 introducing Regulation 67 and Appendix VII-A is consistent with and in consonance with the provisions of the MRTP Act.

24. **Slums and Slum TDR and 1977 "Slum**

Rehabilitation Amendment:

i. Slums have been a problem in Mumbai occasioned by the State's inability to protect public lands from encroachment. This administrative failure is occasioned by Vote Bank Politics. Consequently the same has reached an alarming situation and is posing a great threat to Mumbai's Planning and its already inadequate infrastructure. Living conditions in the slums are unhygienic and pose a great threat to health, though now, facilities like tap water, garbage clearance, electricity and toilets have been provided. According to the estimates, the number of persons who live in slums ranges between 50% to 60% of the city's population. A number of schemes have been devised like slum improvement, slum upgradation under the World Bank Project and also redevelopment schemes by granting FSI upto 2.5. The last scheme has given scope for societies of slum dwellers and developers to develop slums which are commercially viable. However, despite all these measures adopted the problem remains unresolved. The problem required a solution which would run across the board. It appears that it is in this background that the Government of Maharashtra, proposed a new slum policy.

. Permission to utilize TDR in corridor areas is inseparably linked with the slum policy as framed in 1995. The Government decided to provide free housing to the slum dwellers and to effectively take steps to eradicate the slums. To achieve the objective, a Study Group under the Chairmanship of Shri Dinesh Afzalpurkar, the then Chief Secretary was appointed and the committee submitted its report which is known as the Afzalpurkar Committee Report. Various amendments have been made by different legislations and a comprehensive slum policy was evolved for the purpose of eradication of slums. The report was submitted on 20th July, 1995. Some dates and events:-

(i) 24th October 1995 : Ordinance was issued amending Slum Areas (Improvement Clearance and Rehabilitation) Act, 1971 (Slums Act) and Chapter 1(A) was added. Under Chapter 1 (A), the Government was empowered under Section 3(a) to constitute the Slum Rehabilitation Authority (SRA). The said Authority was constituted for the purpose of implementation of Slum Rehabilitation.

Thereafter Act 4 of 1996 was passed and Chapter IA was inserted in the Slums Act.

(ii)23rd November 1995 : Section 2 (19) of the MRTP Act was amended and Slum Rehabilitation Authority (SRA) was given status of a Planning Authority.

Section 37(IB) was inserted and SRA was empowered to make modification in a final Development Plan for the purpose of implementation of slum rehabilitation schemes.

Section 152 of MRTP Act, was amended and government was empowered to delegate the powers under section 44, 45, 46, 54, 55, 56, 135 and 136 of the MRTP Act to the SRA.

Section 144(B) is inserted in BMC Act and the property tax was levied at a reduced rates.

Section 354(AAA) was inserted in the B.M.C. Act and powers relating to the Building Regulations were delegated to

SRA.

(iii)16th December 1995 : Under Section 3 (a) of the said Ordinance, Slum Rehabilitation Authority (SRA) was constituted.

(iv) 17th April, 1996 - 25th April, 1996: The S.R.A. invited objections and suggestions to the general slum rehabilitation scheme for Greater Mumbai.

25th April, 1996, 3rd May, 1996 and 7th May, 1996: By further notification issued by SRA under Section 37 (1-B) of the M.R.T.P. Act, objections and suggestions were invited by the S.R.A. to proposed modifications in the D.C.Regulations including the insertion of a proposed Appendix VII-B Previous Appendix VII to be reacted as VII-A).

(v) 27th August, 1996: By further notification the GOM invited objections and suggestions to its proposed notifications to the D.C.Regulations.

(vi)15th October 1997 : Development Control Regulation 33 (10) is amended.

vii.19th April, 1998: General Slum Rehabilitation Scheme for Greater Mumbai was approved by the SRA (after considering objections and suggestions) and notified.

viii.24th March, 1999: A notification was issued by the GOM, by which the GOM clarified that the TDR generated by plots situated in the areas mentioned in Regulation 11 of Appendix VII (this would include the said three areas), would be allowed to be used on the remaining area of the plots unaffected by the reservation as contemplated by the Development Plan, subject to the following conditions:- (a)Both parcels of land i.e. one under the DP reservation and the other not affected by DP reservation should be contiguous and under one (b)Utilization of TDR would be subject to the other provisions of the DC Regulations and those under the CRZ notification.

25. The original Appendix VII issued in 1991 as part of the DC Regulation was re-numbered as Appendix VII-A. We may refer to some Regulations of Appendix VII-B namely Regulations 9, 10, 11 and 13 which read as under:-

. 9.Notwithstanding any provisions contained in Appendix VII-A, the DRCs may be used-

(a)On any plot of land in the same ward in which TDR has originated, the ward not being in the Island City.

(b)On any plot lying to the north wholly or partly of the plot in which TDR originated, the plot not being in the island city.

10. A DRC shall not be valid for use on receivable plots in the area listed below:-

(i)Coastal Regulation Zone -I and areas in NDZ, TDZ and the areas for which the MMRDA has been appointed Special Planning Authority.

(ii)On plots where Slum Rehabilitation Projects have been taken up or are possible.

(iii)Areas where the permissible FSI is less than 1.0 FSI except "M" Ward.

(iv)Heritage buildings and precincts notified under DC Regulation No. 67.

11.Notwithstanding the provisions in Appendix VII-A, sub-regulation 12, the use of DRC on the TDR receiving plot will be subject to the same regulations that are applicable to the TDR receiving plot. There would be no restrictions on which zone TDR can be received, except the provisions in sub-regulation 9 and 10 above.

13. Any TDR receiving plot shall not be eligible for more than 100 percent additional FSI in whichever combination TDRs are received provided at least 20 percent of the FSI shall be mandatorily kept for use of TDR generated as surplus

from slum rehabilitation scheme. The source of TDR could be from slum redevelopment, DP reservations or DP road going through TDR receiving plot.

. For the purpose of implementation of the slum policy as a whole, the provisions of Slums Act, 1971, provisions of MRTP Act and provisions of BMC Act were amended. In pursuance of the said amendments, SRA has been given power to propose amendment to the final development plan for achieving its objective. In pursuance of the said power, the SRA proposed an amendment to Development Control Regulation 33 (10). After following the due process under section 37 of the MRTP Act, the amendment to DC Regulation 33(10) came into effect. In fact objections and suggestions were invited and then only the original proposal was modified. The generation and use of TDR is therefore inseparably linked with the slum policy as a whole as enacted under the Slums Act, MRTP Act and DCR 33 (10). The same is evolved considering the necessity of the times. Considering the urgent need of removing the slums and by following the due process of law the amendment was made. It appears that neither B.M.C. nor MHADA or Traffic Department or MMRDA or any public authority or any person actively working in

the field of environment objected to the said amendment. The utilization of TDR has to be construed as an integral part of the slum policy. The generation of a TDR and utilization thereof is one of the parameters for the purpose of effectively implementing the Slum Policy as enacted. The said policy was evolved on the recommendations and report of the Study Group viz. Afzalpurkar Committee. Therefore, there was a consultation with experts. The utilization of TDR under 33 (10) cannot, therefore, be read in isolation. Once we accept that the eradication of a slum is an urgent and pressing need of the times and furtherance of the objects of the statute viz. MRTP Act, it is for the Planners and the SRA to decide what parameters are to be adopted for implementation of the said scheme. Moreover DCR 33(10) as amended read with Slums Act and MRTP Act as amended forms a complete code in itself. The user of FSI/TDR in corridor area therefore, has to be seen in the light of a policy as a whole and not in isolation and in comparison with the other provisions of DCR.

26. With that we may now consider the challenges as formulated on behalf of the petitioners.

(i) It is firstly submitted that D.C. Regulation 34 and Appendix VII-B are ultra vires Articles 14 and 21 of the Constitution of India in as much as they are manifestly arbitrary, unreasonable and discriminatory.

(ii)Secondly D.C. Regulation 34 is manifestly arbitrary and unreasonable and ultra vires in as much as it permits/provides for the doubling of the constructed area/occupancy anywhere in the suburbs from the prescribed F.S.I. 1.00 to 2.00) by use of TDR without having regard to the carrying capacity of the Receiving plot/area and despite the fact that large areas of the suburbs are already overcrowded/congested and the infrastructure is already inadequate/under strain.

(iii) Alternatively D.C. Regulation 34 which permits use of TDR anywhere in the suburbs (and in particular suburban wards HW (Bandra), HE (Khar-Santa Cruz), KE (Andheri) and L (Kurla) while prohibiting

the use of TDR in all the Island City wards (on the ground that such island city wards are congested and overcrowded) is ex facie arbitrary, discriminatory and ultra vires Article 14.

(iv) The 1997 Amendment which introduced Appendix VII-B and permitted the use of slum TDR in the three Railway Corridors whilst continuing the ban on use of D.P. Reservation TDR in such corridors is manifestly arbitrary, unreasonable, discriminatory and ultra vires Article 14 of the Constitution of India.

27. We shall first deal with the submission that the impugned D.C.Regulation 34 and Appendix VII-B are ultra vires Article 14 and 21 of the Constitution of India in as much as they are manifestly arbitrary, unreasonable and/or discriminatory. We are conscious of the fact that the Supreme Court in **Subramaniam Swamy (Dr) Vs. Director, C.B.I. and others (2005) 2 SCC 317,** has referred the issue, whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Article 14 of the Constitution are available or not as grounds to

invalidate a legislation to a larger Bench. It is now settled law that making of DC Regulations and amendment thereof are Legislative functions (See **Pune Municipal Corporation vs. Promoters & Builders Association, (2004) 10 SCC 796.**

. D.C. Regulation 34 reads as under:-

> "34.Transfer of Development Rights.-- In certain circumstances,the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These rights may be made available and be subject to the Regulations in Appendix VII hereto."

In **Kruse vs. Johnson reported in 1898 2 QB 91 at 99,** considering manifest arbitrariness, it is observed as under:-

> "In this class of cases (bye-laws of railway companies and dock companies) it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or

unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different stand-point. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

. Again on page 100 of the said decision, it was observed:

"A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too

much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges."

In the same case, at page 104 it was observed "Three considerations appear to me to apply with especial force to such an authority, dealing with such subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations such as dock or railway companies, who often have a pecuniary interest in their bye-laws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as country Council be credited with adequate knowledge of the locality, its wants and wishes. Thirdly, the opportunity afforded by legislation for a request for reconsideration, and an appeal to higher authorities, by members

of the public shews that any bye law which comes into force has secured at least the acquiescence of those whom it affects."

. In **Cinnamond & Ors. Vs. British Airport Authority, 1980 1 WLR, 582,** Lord Denning observed as follows :

"Many years ago I had to consider those cases when I drafted the bye-laws for the Southern Railway Co. In those days, the Courts used to interpret Railway bye-laws with jealous eye almost malevolently. Prepared to strike them down if on interpretation they could be said to be too wide or too uncertain. To my mind, that approach is entirely out of date - at any rate, in regard to bye-laws made by this great statutory authority (the Airport Authority), with its Chairman and Board specially selected with all the safeguards required by the statute: and the bye-laws confirmed, as they have to be, by the Secretary of State. It seems to be that the approach nowadays should be different in regard to modern

bye-laws. If the bye laws is of such a nature that something of this kind is necessary or desirable for the operation of the Airport, then the Courts should endure to interpret the bylaw so as to render it valid rather than invalid. The Latin Maxim is Ut res magis valeat quam pereat - It is better for a thing to have effect than to be made void. If it is drafted in words which on a strict interpretation may be said to be too wide, or too uncertain, or to be unreasonable, then the Court - so long as the words permit it should discard card the strict interpretation and interpret them with any reasonable implications or qualifications which may be necessary so as to produce a just and proper result."

. In the same case, Lord Justice Brandon while dealing with the issue as to whether the authority had enacted the bye-law by acting on the improper material or by not having regard to the proper material by coming to their decision, rejected the said argument. In that context, Lord Justice Brandon noted that the prohibition imposed by the impugned bye-law was not a permanent

prohibition.

. Development Control Regulations form a part of the Development Plans and do not have a permanent existence, but they are liable to be revised every 20 years, is a circumstance mitigating arbitrariness. The aforesaid decision in Kruse vs. Johnson has been followed by the Supreme Court. See Maharashtra S.B.O. & H.S. Education vs. Paritosh reported in AIR 1984 SC 1548 at 1555. See also Suman H.C. vs. Rehabilitation Ministry Employees Housing Building Society Ltd. reported in (1991) 4 SCC 488 at 499-500. In fact in **Khoday Distilleries Vs. State of Karnataka (1996) 1 SCC 304,** the Supreme Court held that in order to hold delegated legislation as arbitrary, such legislation must be manifestly arbitrary i.e. a law which could not be reasonably expected to emanate from an authority delegated with law making power.

28. In the case of a delegated legislation, the question that is required to be considered is not, from the view point of what material was available at the time when the legislation was enacted, but whether the delegated legislation is either beyond the scope of the Act or is ex-facie

or manifestly arbitrary i.e. without requiring any evidence. The impugned delegated legislation is enacted under the Maharashtra Regional Town Planning Act. The impugned delegated legislation pertains also to the issues under the Slum Clearance Act. Both the Acts are required to be harmoniously construed and in deciding the challenge under Article 14 of the Constitution of India or under Article 21 of the Constitution of India, regard must be had to the objects sought to be achieved by the said legislation considering the objects of the relevant enactment. The Maharashtra Slum Clearance Act, 1971 and the Maharashtra Regional Town Planning Act have both been enacted to achieve the same or similar purpose. The enactments were brought into force and the delegated legislation was enacted to meet the emerging challenges and changed situations. See State of Maharashtra vs. Mahadev Pandarinath Dhole reported in 1980 Bombay Cases Reporter, 590.

29. When can delegated legislation be said to be unreasonable. The petitioners for that must establish the facts which support the plea of unreasonableness. The unreasonableness must be seen by merely reading the impugned Legislation itself and not by enquiring as to what material

justifies the delegated legislation. When you use the expression unreasonable, it must be understood that it is unreasonable not in the sense of it not being reasonable but in the sense that it is manifestly arbitrary. (See **Indian Express Newspaper (Bombay) Private Limited vs. Union of India, AIR 1986 SC 515.** The Court when testing the constitutional validity of a piece of delegated legislation on the touch stone of Article 14 of the Constitution, can examine whether the criterion adopted is reasonable. "Reasonableness, for purposes of judging whether there was an excess of power or an arbitrary exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power. (See **Meenakshi Mills vs. Union of India, AIR 1974 SC 366, Panipat Co-op. Sugar Mills vs. Union of India, AIR 1973 SC 537 and SI Syndicate vs. Union of India, AIR 1975 SC 460).**It would, therefore, be clear from the above, that it would not be possible for this Court considering the object behind the D.C. Regulation and Appendix VII-B to hold that they are ultra vires Article 14 and 21 of the Constitution of India as being manifestly arbitrary, unreasonable and or discriminatory.

. In **Maharashtra State Board of Secondary and Higher Secondary Education & Another vs. Partosh Bhupeshkumar Sheth & Ors., (1984) 4 SCC 27** the Supreme Court was pleased to observe as under:-

> "The legal position is well-established and even a bye-law cannot be struck down by the Court on the ground of unreasonableness merely because the Court thinks that it goes further than "is necessary" or that it does not incorporate certain provisions which, in the opinion of the Court, would have been fair and wholesome. The Court cannot say that a bye-law is unreasonable merely because the Judges do not approve of it. Unless it can be said that bye-law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. The responsible representative body entrusted with the power to make bye-law must ordinarily be presumed to know what is necessary, reasonable, just and fair...."

. We may also gainfully refer to the judgment of

the Apex Court in **M.P. Cement Manufacturers' Association vs. State of M.P. and Ors., (2004) 2 SCC 249.** In the matter of challenge to a Legislation on the ground of arbitrariness the Supreme Court was pleased to observe as under:-

> "The statutory requirement for consultation with a body of experts before proposing legislation will serve as an inbuilt safeguard against a challenge under Article 14 of the Constitution apart from anything else."

30. A development plan has to be drafted taking into consideration what is set out in Section 22 of the M.R.T.P. Act. Relevant portion of Section 22 reads as under:-

> "22. Development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say.--

(a)....

(b)....

(c) proposals for designation of areas for open spaces, playgrounds, stadia, zoological gardens, green belts, nature reserves, sanctuaries and dairies;

(d) transport and communications, such as roads, high-ways, park-ways, railways, water-ways, canals and air ports, including their extension and development;

(e) water supply, drainage, sewerage, sewage disposal, other public utilities, amenities and services including electricity and gas;

(f) reservation of land for community facilities and service;

It will thus be clear that all these relevant aspects had to be borne in mind before the draft plan was sanctioned or thereafter modified. There is no challenge on the ground of procedural ultra

vires and, therefore, it is presumed that those aspects were considered, apart from the fact that the record shows that this procedure was followed before the Delopment Plan was notified.

31. The further submissions are that the action of the Respondent is discriminatory as the classification is purported to be made in the Regulation between the Island City and the suburbs, on the ground of over crowding/congestion. The impugned regulation purports to make an apparent discrimination between the use of slum TDR in the three corridors and the continuing prohibition on the use of other forms of TDR in the corridor and the prohibition against the use of any form of TDR in the Island City Wards and the permission to use the TDR in the suburban wards. The classification, is based on a non-intelligible differentia, or on a differentia which has no nexus to the object of the provision. (See **Sharma Transport Vs. Govt. of A.P. (2002) 2 SCC 188).** There are no specific averments in support of such a plea as set out earlier. The burden it is submitted to affirmatively establish that such classification is rational and bears a rational nexus with the object to be achieved is on the State. Reliance is placed on authorities to which reference may be made

subsequently. Material has been placed by the Respondents showing the land area and the population per sq. kilometre. The land area in the island city admeasures 68.71 sq. kilometres. The population per sq. kilometre is 46207 with the exception of Colaba possibly because it is a commercial area. On the other hand it ranges from low of 34,000 in Matunga to a high of 1,11,228 in Marine Lines. In the other parts in the suburbs in an area of 210.34 sq. kilometres the population per kilometre is 16,698 with only Khar-Santacruz, Bandra and Kurla Wards having a population between 29,359 to 46,360 per sq. kilometre. The other infrastructural facilities are the same, power, water supply, sewerage, storm water, drainages and roads. The limited question is whether this by itself can result in holding that the law is arbitrary and/or discriminatory. The material on record also indicates that a large number of slums are located in the suburbs. The entire TDR policy is closely linked with the slum rehabilitation policy. It has been pointed out on behalf of the Corporation that the utilisation of slum TDR is for the benefit of redevelopment of slums which would not only help rehabilitation of slum dwellers and provide them with better amenities, but it would also facilitate the planning of the city by

eradication of slums. In fact there is a substantial concentration of slums in the suburbs and also corridor and the utilisation of slum TDR will result in removal of slums in the area, thereby relieving congestion. The amendment/modification involves town planning and socio-economic planning and, therefore, has a direct nexus and facilitates the object of the M.R.T.P. Act. To prove that the classification is arbitrary or unreasonable and has no nexus with the object of slum TDR the burden was on the petitioners to support the same by producing material. It is no doubt true that this is a PIL Petition. Notwithstanding that it was on the petitioners to discharge the burden, which was cast on them. This is not a case of a private entrepreneur putting up a project to invoke the new burden of proof in environmental matters. We are concerned with an exercise in subordinate legislation.

. In so far as the use of TDR in the Island City and its Wards and the suburbs and its Wards, the law we presume is settled. Challenge on the ground of procedural ultra vires cannot be sustained. Secondly, the concept of consultation before the D.C. Regulation is made, mitigates the

challenge on the ground of arbitrariness. In making a D.C.R. and/or a development plan there is a specific procedure to be followed including consultation and consideration of the various parameters as set out in Section 22 of the M.R.T.P. Act. The State and the other Respondents have produced material to show that it has complied with the legislative requirements. In our opinion, therefore, the challenge must be rejected. We may only point out that what form of TDR is to be used is immaterial. The suburbs have a FSI CAP OF 1.00. The additional FSI of 1.00 can only be from heritage TDR, Road TDR, RG TDR and Slum TDR. The form or colour of TDR does not matter. What is relevant is the grant/use of additional FSI by way of TDR.

32. The learned Amicus Curiae has relied on D.S. Nakara and Others (supra)' B. Prabkahar Rao (Supra) and M.P. Vashi (supra) to contend that it is the State that must positively establish that classification is rational and bears a rational nexus with the object sought to be achieved. This argument is based on the material contained in the affidavits of the State, that the classification is based on the density of population and or over crowding/congestion. The validity of a legislation

cannot be based on what is set out in the affidavit, but on the legislative intent. A development plan before being published and which forms part of D.C. Regulation, has to take into consideration the requirements of Section 22 of the M.R.T.P. Act. It is in that context, that the burden of proof needs to be considered. The respondents have submitted, placing reliance in the case of Ramkrishna Damlmia (supra) that considering the presumption in favour of the constitutionality of the enactment, the burden is on the person invoking Article 14, to show that there has been transgression of the constitutional principles. The Judgments relied upon by the learned Amicus curie may be explained. In D.S. Nakara and Others, the challenge was to the legislation which deprived benefits of liberalised pension formula to persons who had retired prior to 31st March, 1979 . The Supreme Court held that in view of the fact that earlier revision of pensions were granted without any disparity, the classification of employees on the basis of the date of retirement could not form a valid criterion for classification. In B. Prabkakar Rao (supra), the Supreme Court was dealing with the matter wherein the State of Andhra Pradesh had sought to unilaterally reduce the age of superannuation from

58 to 55 of employees who had attained that age between February 28, 1983 till August 23, 1984 when the age of superannuation was once again increased to 58. The Supreme Court held relying on D.S. Nakara (supra) that such classification was violative of Article 14. The Supreme Court further held that since a select few among the class were sought to be excluded i.e. were sought to be superannuated at the age of 55, it would be upon the State to discharge the burden of reasonableness. In M.P. Vashi (supra), the private law colleges were sought to be deprived of financial aid whereas private colleges for other professional courses were being granted aid. The reason advanced for the classification was paucity of funds. The supreme court held that the classification was arbitrary. In all those cases prima facie the classification was found to be unreasonable and consequently the burden of proof shifted on the State. There is otherwise no departure from the ordinary principle, the exception being the new burden of proof in environmental matters, that there is always a presumption as to constitutionality of the legislation and the burden is on the petitioner to show that it is violative of Article 14 of the Constitution of India.

33. Let us examine the new burden of proof. The challenge in the present case is on the ground of un-reasonableness of the impugned legislation which affects the environment and consequently the quality of life. The question is whether the continuance of operation of D.C. Regulation 34(10) is arbitrary. In that context let us examine the new burden of proof as set out in Vellore's Citizens' Welfare Forum Vs. Union of India reported in (1996) 5 S.C.C. 647. In that case, the Supreme court referred to the uncertainty of scientific proof and its changing frontier from time to time and to the precautionary principle. The Court held that the precautionary principle and the polluter pays principle are part of the environmental law of the country and the burden of proof is on the developer or industrialist who is proposing to alter the status quo. This principle was followed in **A.P. Pollution Control Board Vs. Prof. N.V. Nayudu reported in (1999) 2 S.C.C. 718** where it was observed :

> "A basic shift in the approach to environmental protection occurred initially between 1972 and in 1982".

. The Judgment has further observed, that the inadequacies of science is the real basis that has led to the precautionary principle of 1982 and that the principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. In such cases the burden to justify an action or approach, lies on the person who is changing the status quo. This principle, therefore, must be confined to those cases where (i) there is direct violation or specific allegation of violation of any environmental law, rule or regulation and (ii) there is uncertainty of scientific proof. In cases under the Town Planning Act where Development Control Regulation is challenged on the ground of arbitrariness, considering the inbuilt mechanism of constitution and preparation of the plan by experts, taking into consideration environment and ecological consideration the issue of burden of proof will be on the person challenging the legislation. The Supreme Court, in deciding those cases did not intend to reverse the ordinary principles of burden of proof in a challenge under Article 14 or Article 21 of the Constitution of India.

. In Narmada Bachao Andolan case (2000) 10 SCC 644, the aforesaid two cases were considered and explained in paragraphs 120 to 125 it is observed as under:

> "120. Shri Shanti Bhushan, learned Senior Counsel while relying upon A.P. Pollution Control Board v. Prof. M. V. Nayudu submitted that in cases pertaining to environment, the onus of proof is on the person who wants to change the status quo and, therefore, it is for the respondents to satisfy the Court that there will be no environmental degradation.
>
> 121. In A.P. Pollution Control Board cases this Court was dealing with the case where an application was submitted by a company to the Pollution Control Board for permission to set up an industry for _the production of "BSS castor oil derivatives". Though later on a letter of intent had been received by the said Company, the Pollution Control Board did not give its no-objection

certificate to the location of the industry at the site proposed by it. The Pollution Control Board, while rejecting the application for consent, inter alia, stated that the unit was a polluting industry which fell under the red category of polluting industry and it would not be desirable to locate such an industry in the catchment area of Himayat Sagar, a lake in Andhra Pradesh. The appeal filed by the Company against the decision of the Pollution Control Board was accepted by the appellate authority. A writ petition was filed in the nature of public interest litigation and also by the Gram Panchayat challenging the order of the appellate authority but the same was dismissed by the High Court. On .the other hand, the writ petition filed by the Company was allowed and the High Court directed the Pollution Control Board to grant consent subject to such conditions as may be imposed by it.

122. It is this decision which was the subject-matter of challenge in this Court After referring to the different concepts

in relation to environmental cases like the "precautionary principle" and the "polluter-pays principle", this Court relied upon the earlier decision of this Court in Vellore Citizens' Welfare Forum v. Union of India and observed that there was a new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo and has become part f our environmental law. It was noticed that inadequacies of science had led to the precautionary principle and the said "precautionary principle" in its turn had led to the special principle of burden of proof in environmental cases where burden as to he absence of injurious effect of the actions proposed is placed on those who want to change the status quo. At p. 735, this Court, while relying upon a report of the International Law Commission, observed as follows: (SCC para 38)

"38. The precautionary principle suggests that where there is an identifiable risk of serious or

irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.".

123. It appears to us that the. "precautionary principle" and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely t be inflicted is not known. When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily on the industry or the .unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up of an industry

is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be an ecological disaster. It is when the effect of the project is known that the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.

124. In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the

> Sardar Sarovar will result in an ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost -effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well known in India and, therefore, the decision in A.P. Pollution Control Board case will have no application in the present case."

34. It is therefore clear that only in those cases involving violation of Environmental Protection laws and ecological disasters, will the principle enunciated in Vellore case and as expanded in A. P. Pollution Control Board's case reported in (1999) 2 SCC 718 be applied. It cannot be applied to every case where some issue relating to environment is raised, more so to those cases, where the substantive legislation lays down the parameter for publishing a development plan and making D.C. Regulations, taking into consideration

environmental needs of the planning area. . Considering these aspects, the court must proceed on the presumption that the law is constitutional. It is only on the Petitioner's discharging the prima facie burden that the legislation is arbitrary or discriminatory would the burden shift on the State to justify the constitutionality of the legislation. In our opinion that burden has not been discharged. In the instant case, material has been produced by the private Respondents to support the constitutionality of the Legislation. It is always open to the court to rely on such material and need not reject the material produced by the private respondents, because it has not come from the State. As we have noted earlier, Legislation which deals with Planning is a socio-economic Legislation and as such laws relating to economic activities would be reviewed with greater latitude than laws touching civil rights such as freedom of speech, etc. The Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula. In such cases the Court must feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas

where fundamental human rights are involved. The Court must therefore adjudge the constitutionality of such legislation by generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. So tested we do not find that the challenge on the ground that the legislation is manifestly arbitrary or unreasonable and/or discriminatory and must be rejected.

35. It is submitted that D.C. Regulation 34 along with Appendix VII-B are also violative of Article 21, which challenge is principally based on the ground that there is congestion caused on account of building activities, inadequate sewerage system and sanitation, water supply and roads, including in the corridor areas. The grant of TDR and its consequent user in the user plot, it is submitted results in affecting the quality of life. We have partly dealt with this argument earlier. On behalf of the Respondents some of the learned Counsel have submitted that the challenges under Articles 14 and 21 of the Constitution of India are inter-related and the challenge under Article 21 will fail, if there is a valid legislation which is not ultra vires Article 14 of the Constitution of India as the challenge under Article 21 applies to

deprivation of life without following the procedure established by law. Once it is established that the impugned legislation does not suffer from procedural or substantive arbitrariness, the challenge under Article 21 of the Constitution of India must necessarily fail. The right to life and healthy environment as guaranteed under Article 21, it is submitted has to be appreciated in the light of Environmental legislation, like Environmental Protection Act, Water Pollution Act, Air Act and other related environmental laws. The M.R.T.P. Act is enacted for the orderly development of the city as a whole. The very purpose of planned development is the betterment of environment. The Ministry of Environment and Forests has issued notification dated 27th July, 2004 amending the Environmental Impact Assessment Notification dated 27th January, 1994. Under 1994 Notification, while carrying out any of the activities as mentioned in Schedule I of the said Notification of 1994, environmental clearance is made mandatory. The notification prescribes the procedure to be followed for getting the environmental clearance. An Environmental Impact Assessment Report is required to be submitted. For that purpose a public hearing is mandatory and the material produced is evaluated by a Committee of Experts.

For construction activities, environmental clearance is required and exemption is given only in certain categories. Counsel for the Respondents have drawn our attention to the judgment of the Supreme Court in Bombay Dyeing (supra), to point out that D.C.R. which is delegated legislation, raises a presumption of Constitutionality and the Court must attempt to uphold the same. It applies both to the original D.C.R. and every validly enacted amendment thereof. Though ecological factors are very relevant considerations in construing a town planning statute, the Supreme Court itself, has made a distinction between the interpretation of Planning and zoning statutes enforcing ecology vis-a-vis industrial effluents and hazardous industries and those relating to concerted efforts at rehabilitating the industry.

. It has been argued before us that Article 21 of the Constitution of India cannot be invoked to introduce the American doctrine of substantive due process into Indian constitutional law. The Supreme Court, it is pointed out, has repeatedly rejected it and for that purpose reliance is placed in the judgment of **Kesavananda Bharati vs. State of Kerala (1973) 4 SCC 225**. In **A.K. Gopalan vs. Union of India, AIR 1950 SC 27** the Supreme Court held that the American doctrine of due process has

not been introduced in the Indian Constitution by its framers who have deliberately omitted the word "due" which word has been used by American Courts, to strike down the legislation, which the Court found was not reasonable and, therefore, was not "due". The report of the drafting Committee of the Constituent Assembly was relied upon to establish that the phrase "due process of law" was expressly substituted with the phrase "according to procedure established by law" and that the two phrases meant different things. By the doctrine of Substantive due process and procedural due process, Courts have imposed a limitation on the legislative powers of the State and determined the substantive reasonableness of legislation, often by marshalling their own views of social and economic policy. In so far as due process is concerned this required the legislation to provide for safeguards including natural justice, as also sufficient safeguards against deprivation of rights in a manner not inconsistent with essential fairness e.g. conferment of unfettered discretion. The focus of the inquiry centres on the process provided rather than the reasonableness or propriety of the legislative or administrative choice. (See American Jurisprudence, 2nd Edition, paras.901-909. In A.K. Gopalan (supra) apart from rejecting the

doctrine of substantive due process, the majority also rejected the contention that the American doctrine of due process should be adopted in part and that procedural due process was a requirement of Article 21. In Maneka Gandhi vs. Union of India, AIR 1978 SC 597, the Supreme Court by a process of judicial interpretation introduced the doctrine of procedural due process. The Court found from the observation in A.K. Gopalan's case, that even on principle, the concept of reasonableness must be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21. Justice Bhagwati speaking on behalf of majority observed :-

> "the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrarines pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would

not be satisfied."

The judgment in Maneka Gandhi introduced the doctrine of procedural due process into Article 21. This has been recognised by subsequent judgments of the Supreme Court including in Francis Coralie Mullin vs. Administrator Union Territory, AIR 1981 SC 746. In Bombay Dyeing and Manufacturing Co. Ltd. Vs. Bombay Environmental Action Group & Ors., (2006) 3 SCC 434, the Court held that Article 21 does not only refer to the necessity to comply with procedure requirements but also substantive rights of citizens. The Courts reference to substantive rights was a reference to procedural due process as it is clear from the following:-

> "So far as the question of compliance of the procedural due process is concerned, it was conceded before the High Court by the writ petitioners - Respondents that the procedural requirements laid down in provisions of Section 37 of the MRTP Act had been complied with.

. It would, therefore, be clear that what the Court must decide is whether D.C. Regulations are fair, just and reasonable.

36. We have already noted that there is no challenge on the ground that D.C. Regulations are illegal and have to be struck down on the ground of procedural due process. We have also rejected the contention that the Regulation is manifestly arbitrary. The material produced before us however, clearly demonstrates that infrastructural facilities for additional housing are inadequate. Whilst considering a challenge to the D.C. Regulations or amendment to the D.C. Regulation, it is always open to the Courts to examine the validity of the legislation both under Article 14 or Article 21. It is not possible to accept as that once a challenge under Article 14 fails, the challenge under Article 21 must necessarily fail, though the test of reasonableness in both Articles may be similar. Considering the wider concept of the expression life, the tests for considering reasonableness would include the adequacy of infrastructure in the D.P. Plan as also in the subsequent amendments. As observed in Bombay Dyeing & Manufacturing Co. Ltd. (supra) "Further more, interpretation of a Town Planning statue which has an environmental aspect leading to application of Articles 14 and 21 of the Constitution of India cannot be held to be within

the exclusive domaine of the executive". The Supreme Court further observed "Interpretation and application of Constitutional and human rights had never been limited by this Court only to the black letter of law. Expansive meaning of such rights had all along been given by the Courts by taking recourse to creative interpretation which lead to creation of new rights. By way of example, we may point out that interpreting Article 21, this Court has created new rights including right to environmental protection." We may now refer to some Judgments involving right to life, in planning statues.

. In **News Item published in Hindustan Times** (2004) 9 SCC 569 while dealing with the Master Plan of Delhi 2001 the Supreme Court observed as under:-

> "It is noticed that increase of FAR and increased density without corresponding increase in provision of services like water, power, circulation, park etc. would lead to making urban areas in Delhi uninhabitable and lead to economic degradation and urban degeneration. Hence, upgradation of services was considered essential before any

relaxation in bye-laws could be considered.

. In **Usman Gani J. Khatri of Bombay vs. Contonment Board and Ors., (1992) 3 SCC 455** the Supreme Court observed:-

"The slogan of the builders and land owners of utilising the maximum area for construction of high-rise buildings for fulfilling the need of houses in big urban cities should always be subservient to the building restrictions and regulations made in the larger interest of whole inhabitants of Pune and keeping in view of the influx of population, environment hazards, sanitation, provision for supply of water, electricity and other amenities."

. In **Consumer Action Group and Anr. vs. State of T.N. and Ors., (2000) 7 SCC 425** the Supreme Court held in the matter of regularisation fees as under:-

"38. We may shortly refer to the possible consequences of the grant of such exemption under Section 113-A by

collecting regularisation fees. Regularisation in many cases, for the violation of front setback, will not make it easily feasible for the corporation to widen the abutting road in future and bring the incumbent closer to the danger of the road. The waiver of requirements of side setback will deprive adjacent buildings and their occupants of light and air and also make it impossible for a fire engine to be used to fight a fire in a high-rise building. The violation of floor space index will result in undue strain on the civil amenities such as water, electricity, sewage collection and disposal. The waiver of requirements regarding fire staircase and other fire prevention and fire-fighting measures would seriously endanger the occupants resulting in the building becoming a veritable death trap. The waiver of car parking and abutting road width requirements would inevitably lead to congestion on public roads causing severe inconvenience to the public at large. Such grant of exemption and the regularisation is likely to spell ruin

for any city as it affects the lives, health, safety and convenience of all its citizens. This provision, as we have said, cannot be held to be invalid as it is within the competence of the State Legislature to legislate based on its policy decision, but it is a matter of concern.Unless check at the nascent stage is made, for which it is for the State to consider what administrative scheme is to be evolved, it may be difficult to control this progressive illegality. If such illegalities stay for long, waves of political humanitarian, regional and other sympathies develop. Then to break if may become difficult. Thus this inflow has to be checked at the very root. The State must act effectively not to permit such situation to develop in the wider interest of the public at large. When there is any provision to make illegal construction valid on that ground of limitation, then it must mean that the statutory authority in spite of knowledge has not taken any action. The functionary of this infrastructure has to report such illegalities within the

shortest period, if not, there should be stricter rules for their non-compliance. We leave the matter here by bringing this to the notice of the State Government to do the needful for salvaging the cities and country from the wrath of these illegal colonies and construction."

37. Judicial review in the present circumstances would be limited to enquire and determine as to whether the Regulations were ultra vires or beyond authority or competence or whether they are in breach of any constitutional prohibition. There is no ground made out for contending that the challenged regulations are ultra vires. the parent Act. The procedure under Section 37 of M.R.T.P. Act having been followed and opportunity given for receiving objections and suggestions and as the concerned D.C. Regulations do not confer unfettered or uncanalised powers or discretion, they would have to be held to meet the tests of procedural due process and cannot be said to be ex-facie arbitrary. The material on record however, would indicate that release of TDR under SRA Scheme, would result in the reserved area becoming available for utilisation. The legislation considering Regulation 64(b) of the

D.C.Regulations, confers power on the Municipal Commissioner to relax in those cases of demonstrable hardship, any of the dimensions prescribed by the Regulations. This permits the Commissioner to relax the set back areas which are vital for air and light in buildings where F.S.I. of 2 is being used after the normal use of F.S.I. of 1 and in hardship cases. The water supply, sanitation and sewerage disposal as per the figures provided by the State and Corporation are inadequate. F.S.I. is being loaded in Wards which are already over congested. Planned development is a facet of right to life under Article 21. There must be a reasonable balance struck between conflicting interests on the one hand of persons already settled and those residing in the slums in unsanitary and unhygienic conditions. Even though we have noted that there are deficiencies in infrastructure in the city, yet considering the statement made on behalf of the State by the Advocate General that the new plan process will commence soon and the considerable delay, we have chosen not to interfere. Other considerations for rejecting the challenge in the present case is because the provisions for slum rehabilitation in other statutes has not been challenged. The figure of protected slum population disclosed by the

Municipal Corporation, would show that increasing F.S.I. is no answer. The law is clear that the planning process must have a clear nexus with the civic amenities which in Mumbai City are inadequate, even if the on going projects are completed on time. The State cannot affect the quality of life of its citizens who believe in the rule of law by releasing additional F.S.I.Any additional release of F.S.I. by further extending the cutoff date of 1st January, 1995 is bound to affect the quality of life and living conditions of those who believe in the rule of law. Financial inability of the State to provide free housing to encroachers on public lands cannot be, by depriving the law abiding citizens, of their rights to a clean environment.

38. It is next submitted that D.C. Regulation No.34 is manifestly arbitrary and unreasonable and ultra vires Article 14 in as much as it permits/provides for doubling of the constructed area/occupancy anywhere in the suburbs (from the prescribed FSI 1.00 to 2.00) by use of TDR without having regard to the carrying capacity of the Receiving plot/area and despite the fact that large areas of the suburbs are already overcrowded/congested and the infrastructure is

already inadequate and under strain. In support of this it is set out that factually D.C. Regulation 34 prohibits use of TDR in the Island City. The FSI of 1.00 in the Suburbs was fixed based on the Planning Authority's assessment of the carrying capacity of those areas and the level of civic infrastructure. The J.B.D'Souza Committee while recommending the use of TDR to secure development plan reservations in view of the BMC's resource constraints had specifically restricted additional FSI to .40. The Committee had noted that the amenity reservations/designations of land in the Plan, generally fall short of the Planning standards and that nearly every ward in Greater Bombay will suffer from shortage of recreational open space even if all the reservations on the Plan materialise. The Municipal Commissioner in a note has observed that TDR be restricted to lands reserved under the development plan in respect of obligatory and essential functions of the Local Authority and should not be expanded to Slum Rehabilitation or reconstruction of old buildings as this will put a tremendous burden on civic infrastructure as a whole which the Corporation would find very difficult to meet with. In the four suburban wards H/E (Khar-SantaCruz) H/W (Bandra) K/E (Andheri) and L (Kurla) the levels of

congestion and overcrowding (population density per sq. km.) is equal to or in excess of the average population density of the Island City and also equal to or in excess of the population density of a number of the Island City wards. It is also pointed out that there is a 850 MLD shortfall in the water supply. The ratio of open/recreation areas has shrunk to .088 acres per 1000 population as against a standard of 4 Acres per 1000 population. The highest levels of vehicular pollution are in the suburbs namely Bandra, Vile Parle, Santa Cruz, Jogeshwari and Malad. The local train system carries loads upto 4 times its design capacity during peak hours. It is, therefore, submitted that this would be ex-facie manifestly unreasonable and arbitrary to provide for doubling of the constructed area/occupany throughout the suburbs, while the existing infrastructure, open/recreation areas, are in large part of the suburbs (and particularly in the four congested/overcrowded wards) inadequate even to carry/support the existing level of occupation/development.

39. On behalf of the Respondent State it is pointed out that there is an absolute cap or ceiling of 2 on the total FSI (including TDR) which

can be loaded in the suburbs. In no event can this be exceeded. The average existing consumed FSI in the island city is in excess of 3. In Marine Drive it is 2.66, in Nariman Point it is 4. In comparison the population densities as reflected by the Census statistics for the Suburbs show that on an average the population of the Suburbs per sq. km. is less than that of the island city and over 65 lac people live in the slums. Hence a load on the infrastructure is already in existence. By clearing the slums the load is not being increased. 16,40,048 sq. meters of land for parks, gardens, playgrounds and recreation grounds has been cleared by applying the TDR provisions in the DCR between 1991 and 2004. There is no material placed by the Petitioners to establish migration of TDR from the Eastern to the Western Suburbs. The State has seriously disputed the factual foundation of the petitioners, that the corridors in the suburbs have no carrying capacity. The experts of the Planning Authority in the State Government who formed part of the statutory machinery for framing the 1991 D.C.Regulation and 1997 modification were duly satisfied and cleared the same. It has been urged that once the DCR is notified it must be presumed that the infrastructure is adequate and that cannot be questioned by the petitioners. It is pointed

out that though the petitioners have placed reliance on the Development Plan of 2025 which was called by the Court it does not prove how development can or cannot be done. Shortcomings in the infrastructure mentioned by the Corporation in the presentation nowhere contemplate cessation on development in the existing DCR. It is also pointed out that there is no authoritative study which establishes congestion in the corridors. The Slum TDR utilized in the 3 corridors is 1,06,015, 229,909 and the TDR utilized is 1.30%, 1.27% and 0.80% respectively of the total area of the corridors. Out of 25,76,251 sq. mts. of slum TDR generated only 418,255 sq.mts., has been utilized in the corridors. Slum Clearance in the corridors on government lands has resulted in re-housing 90,000 slum dwellers implementation of 23 schemes for public purposes and 99 schemes for rehabilitation. The Afzalpurkar Committee after due study recommended utilizing slum TDR in large parts of the corridors. This is shown in marked areas in plans submitted by the State. The Government after due deliberations and consultation and following the statutory public consultation process permitted slum TDR to be utilised in the entire corridor in 1997 i.e. about 9 years ago. Since August 2004, the loading of TDR on existing

buildings by putting up columns in the marginal open space is prohibited. Thus existing buildings will continue as they are without TDR being loaded. The entire Development Plan and the TDR policy are all due for review at the end of 20 years when the next Development Plan will have to be brought into force under Section 38 of MRTP Act. Hardly 4 years remain.

40. Any Development Plan framed has to take into account infrastructural facilities including providing clean environmental conditions to the citizens and remedial measures for de-congestion of population. The main features of a development plan considering Section 22 of the M.R.T.P. Act are as under:-

i) To prevent future deterioration of environment through proper land use, zoning and control of development.

ii) To decongest and redevelop the overcrowded developments and slums so as to improve environmental conditions.

iii) To conserve orderly existing environmental amenities.

iv) To improve the living conditions by augmenting infrastructural facilities.

v) To foster new development in the suburbs and extended suburbs on orderly lines.

vi) To improve physical and social conditions of this Metropolis.

. Hutments occupy about on 26 sq. kilometres of land in Greater Mumbai. 60% of these hutments are on 21 sq. kilometres of private land. The Supreme Court in **Maneklal Chhotalal & Ors. vs. M.G. Makwana & Ors., AIR 1967 SC 1373** has considered the constitutional validity of the Bombay Town Planning Act, 1954 as also the provisions for framing Town Planning Scheme. While considering the competence of the State Legislature the Supreme Court located the field of Legislation under Entry 20 of List III which is economic and social planning. The Supreme Court noted from various recognised authorities including Corpus Juris Secundum Vol.70 as to what the word Planning means and observed as under:-

"In connection with municipalities, the

term connotes a systematic development contrived to promote the common interest in matters embraced within the police power, with particular reference to the location, character and extent of streets, squares, parks and to kindred mapping and charting."

In **Padma vs. Hiralal Motilal Desarda & Ors., (2002) 7 SCC 564** considering a development plan the Supreme Court observed as under:- "31. Laws dealing with development planning are indispensable to sanitation and healthy urbanization. Development planning comprehensively takes care of statutory, manual, administrative and land-use laws hand in hand with architectural creativity. In the words of a well-known architect,development planning is the DNA of urbanization -- the genetic code that determines what will get built. A development plan is essential to the aesthetics of urban society. American Jurisprudence, 2d (Vol. 82, at p.388) states:

" 'Planning', as that term is used in connection with community development, is a generic term, rather than a word of

art, and has no fixed meaning. Broadly speaking, however, the term connotes the systematic development of a community or an area with particular reference to the location, character, and extent of streets, squares, and parks, and to kindred mapping and charting. Planning has in view the physical development of the community and its environs in relation to its social and economic well-being for the fulfilment of the rightful common destiny, according to a 'master plan' based on careful and comprehensive surveys and studies of present conditions and the prospects of future growth of the municipality, and lembodying scientific teachings and creative experience."

32. The significance of a development planning cannot therefore be denied. Planned development is the crucial zone that strikes a balance between the needs of large-scale urbanization and individual building. It is the science and aesthetics of urbanization as it saves the development from chaos and

uglification. A departure from planning may result in disfiguration of the beauty of an upcoming city and may pose a threat for the ecological balance and environmental safeguards."

41. On behalf of the Petitioners, the learned Amicus Curiae submits that regulation 34 itself embodies a legislative policy linking the use of TDR to carrying capacity - inasmuch as it prohibits the use of TDR in the Island City wards on the ground that they are congested/overcrowded. This would it is submitted mean that whilst the use of TDR in the city wards is to be linked to carrying capacity (and therefore, prohibited), in the suburbs the use of TDR is not related to carrying capacity/congestion/overcrowding. Such action is ex facie and manifestly unreasonable and arbitrary.Even otherwise it is ex facie unreasonable and manifestly arbitrary and unreasonable to contend that the use of TDR (which has the effect of increasing - in the present case doubling - the constructed area/occupancy/density) can be delinked from the carrying capacity/adequacy of infrastructure and amenities in the receiving area. Section 2(9-A) and Section 126(1)(b) of the M.R.T.P. Act, provides a statutory

recognition/base for the grant of TDR. They stipulate that TDR may be used in areas as prescribed in the D.C. Regulations. These provisions do not stipulate, or posit, that TDR can be used in overcrowded or congested areas, where the infrastructure is already inadequate or already under strain. Section 2(9-A) and 126(1)(b) are compatible with the use of TDR being restricted to areas which are not congested/overcrowded and where the infrastructure (roads, open areas, etc.) can carry/cope with such additional development/construction/occupancy. For that purpose reliance is placed in the judgment of the Supreme Court in Ref : Pollution of River Yamuna (2004) 9 S.C.C. 569 and 575 which we have quoted earlier and which has taken a view that upgradation of services was essential before any relaxation in byelaws could be considered. In that case the Supreme Court has stayed the operation of subordinate legislation/ notification issued under the byelaws which purported to permit increase of FAR and increased density without corresponding increase in provisions of services like water, power, circulation, parks etc.

. From the statistics provided by the State, it has been pointed out that average

existing consumed FSI in the island city is in excess of 3. In Marine Drive it is 2.66, in Nariman Point it is 4. Material as to existing infrastructural figures have been placed before this court. As against the average FSI of 3 already consumed in the island city, in the suburbs the cap through out would be FSI of 2. Apart from that we may point out that the State and the Corporation in the affidavits have disclosed the existing infrastructure including in the corridor areas to submit that the infrastructure is adequate or sufficient to bear utilization of slum and heritage TDR in the corridor areas. It is so set out in the affidavit of Mr. Shankar Thorat dated 24.9.2004. We have however, already pointed out to the inadequate infrastructural amenities even as of today.

42. It may be important to note some additional features Under DC Regulations 32, FSI of 1.33 in the city and 1 in the suburbs is permitted. Additional FSI was granted under Regulations 33, in certain categories. There were 12 categories when the DC Regulations came into force in 1991 i.e. 33 (1) to 33 (12). In all these categories irrespective of the location of the property, higher FSI was generated which was more than 1.33

in the city and 1 in the suburbs. For example, additional FSI was permitted under DCR 33 (1) for surrender of land for road. For redevelopment of the property, FSI of 2 was permitted under DCR 33 (7). For slum redevelopment, FSI of 2.5 was permitted under DCR 33 (10). The concept of TDR in 1991 regulations was under Regulation 34 read with Appendix VII. Therefore Regulations 32, 33 and 34 are to be read separately for the purposes for which they are enacted and they form category in themselves. Higher FSI granted to MHADA under DCR 33 (9) is for undertaking housing by MHADA or higher FSI granted under DCR 33 (3) is for development of Government is not to be equated with DCR 32 or DCR 34. Similarly it can be seen that subsequent to 1991 by various notifications, there are certain categories added after DCR 33 (12). If the argument of the Petitioner is to be accepted, that there is a change of status quo from the original DC regulations and such modification will have to be justified, it will be impossible and may bring the whole planning to a stand still as also the development plan.

43. From the FSI pattern of whole Mumbai, FSI actually consumed in most of the areas of the Mumbai City is more than 2 right from Backbay to

Mahim. Achieving the FSI of 1.33 is an objective and cannot be a reality, as most of the parts of the city are either covered under 33 (7) or 33 (10) or special schemes like Backbay Reclamation, etc. In the suburbs the FSI of 1.8 (1 + .4 + .4) was already available under Regulation 34, Appendix VII and DCR 33(1) in combination. The entire regulation 33 deals with additional FSI and a mere look at DCR 33 (1 to 12) as it stood when enacted in 1991 and the amendments made from time to time, establish that the FSI of 2 cannot be said to be arbitrary as a planning norm. Under DCR 33(10) for slum existing in the corridor, the FSI available is 2.5. Under DC Regulation 33(15) for removal of contravening structures in any town planning scheme, the FSI in city is 3.19 and FSI in suburbs is 2.5. Many areas in the corridor are covered under the Town Planning Schemes. Under 33(1) for handing over the road additional .4 FSI is available in the Corridor area, i.e. total 1.4, under DCR 33(9) the FSI available for the developments undertaken by MHADA is 4 irrespective of the fact where the property is situated in a corridor or outside. The FSI of the areas where MMRDA is a planning authority, the FSI is 1.5 and 2 and for Slum Areas FSI is 2.5. For construction of housing for dishoused, FSI available is 4 under DCR

33(8). For construction of buildings for Government, Semi-government and public sector undertakings under DCR 33 (3) the FSI is 300% over and above the existing FSI that is nearing 4. There are various amendments made in DC Regulation DCR 33. All this is supported by the material on record. In the Affidavit dated 12/8/2005 filed by the GOM, the GOM has justified why the recommendations of the J.B.D'Souza Committee and the Afzalpurkar Committee were not found acceptable and the TDR policy framed in its present form.

44. We are clearly therefore, of the opinion that the Petitioners have been unable to establish that there is no carrying capacity in the suburban areas and or on the receiving plot(with reference to the FSI Cap of 2) and on that ground the D.C. Regulation 34 is arbitrary and unreasonable and ultra vires of Article 14 of the Constitution of India.

45. We may now deal with the alternative contention that the D.C. regulation 34 which permits the use of TDR anywhere in the Suburbs (and in particular in Suburban wards HW (Bandra), HE (Khar-Santacrus), KE (Andheri) and L (Kurla) while prohibiting the use of TDR in all the Island City

wards (on the ground that such island city wards are congested and overcrowded), is ex facie arbitrary, discriminatory and ultra vires Article 14.

. This submission practically covers the earlier two submissions. We may however, note some contentions as this challenge is specifically linked to the three wards. There can be no dispute that D.C. Regulation 34 classifies Mumbai city in two areas (i) the Island City Wards where TDR is not permitted to be used, and (ii) the suburban wards, where TDR can be utilised to double the FSI from the prescribed 1.00 to 2.00. It is submitted that the justification given by the 1st respondent State for this classification, is that "the Island City is congested/overcrowded". It is submitted that many suburban wards are as congested/overcrowded than some Island City wards. The population density (population per sq. km) in suburban wards H/W (Bandra) 51,275 and Ward L (Kurla) 58,512, exceeds the average Population density of the Island City : 48,581. Moreover, even in absolute terms the Population Density in suburban wards H/W Bandra and L : Kurla exceeds the population density in Island City wards A (18,628), B (48,247). F/N (34,182) and G/S

(49,723). Similar the population Density in suburban ward H/E : Khar Santa Cruz (44,778) exceeds the population density in city wards A , F/N & G/S and the population density in suburban a ward K/E (Andheri) (34,336) exceeds the population density of City Ward A. In such a situation banning TDR throughout the Island City wards while permitting it even in the aforesaid four suburban wards constitutes class legislation.

. As to whether a cap can be placed on development in the wards of Bandra, Khar, Santacruz and Kurla, a query was put to the learned Advocate General pursuant to which Ramanand Tiwari, Principal Secretary, Urban Development Department has filed affidavit on 15.6.2006. We have earlier referred to the said affidavit to point out that the increase in population in Bandra is almost static, though in the other wards, there has been increase in population. The population density over the decade has increased between 5 to 10%. The TDR policy is linked with the policy of removing or clearing the slums. There is no challenge to the Slum Rehabilitation Programme. Out of TDR generated from D.P. Reservation, roads, development of slums, from heritage buildings in the wards of Bandra, Khar, Kurla has been 9.67%,

2.31% and 5.13% thereby indicating that there is no concentration of TDR in these wards which is adjacent to the city. There are in Bandra, Khar and Kurla wards, a substantial number of existing buildings and it is improbable that all these buildings will be demolished solely for utilization of T.D.R. In so far as existing buildings are concerned, there is ban for putting up columns in marginal open space to use additional TDR pursuant to Government order dated 21.8.2004. The development plan is due for renewal in 2011 and the revised development plan is being processed from 2008. We have already adverted to the transport facilities both by road as well as by rail which have been planed. Once we have rejected the general challenge to D.C. Regulation 34, both on the ground of Article 14 and 21, as also the specific challenge to D.C. Regulation 34, it would not be possible merely by comparison of the three suburban wards with the city wards, to strike down the provisions in the DCR. Courts must presume that the authorities who went in to the issue of framing the development plan and or modifications thereto, were guided by the provisions of the Act and have taken into consideration the principles as contained in M.R.T.P. Act while making subordinate legislation.

46. In the absence of a clear-cut case of manifest arbitrariness, unreasonableness or discrimination, specially in the matter of planning process which has taken into consideration the right to life of nearly 50% of the city's population living in slums,the challenge made on this ground, cannot be sustained.

47. The last ground urged is that the 1997 Amendment which introduced Appendix VII-B and permitted use of slum TDR in three Railway corridors while continuing the prohibition on the use of DP Reservation TDR in the said three corridors is manifestly arbitrary, unreasonable, discriminatory and ultra vires Art. 14 of the Constitution of India. The submission is as under:

i) The three Railway Corridors were excluded from the use of TDR on the basis of the BMC/Planning Authority's plea that they be "closed to the exercise of these rights". The Afzalpurkar Committee recommended that the Central Corridor (i.e. between Western Railway and the Western Express Highway)_ be opened for use of TDR and the other two Corridors (i.e. Western Railway and S.V. Road and Central Railway and L.B. Marg) be

available for use of TDR beyond Borivali and the boundary of N. Ward respectively. The Government added Appendix VIIB by which, ban/prohibition on the use of slum TDR through out the three corridors was lifted. It is submitted that no material has been placed to disclose the reason for the total removal of the ban on use of slum TDR in the three corridors. The arguments advanced are the same or similar in the matter of carrying capacity which we have earlier referred to. The State has explained that it was so done, as otherwise, no one will bid for S.R.A. scheme in the Island city as there is a ban on use of TDR anywhere in the island city.

. It is submitted that it is unacceptable and ex facie unreasonable to use TDR in the three corridors as there appears to be no rational nexus to the object. Reliance is placed on the judgment of the Apex Court in 1973 (1) S.C.C. 500 where the Supreme Court held that classification in the matter of payment of compensation could not be made on the basis of public purpose for which the land was acquired and as such the classification would be bad.

49. The contention that Development Rights ought not to have been permitted in the railway station

precincts has been answered as under:-

[a] The J.B.D'Souza Committee had recommended that Zones near Suburban Railway lines should be closed for use of TDR in the Development Control Regulations 1991.

[b] The ban was however extended to the entire area of the corridors. Subsequently it was found that such plots reserved for public purposes could not be developed for the purposes so earmarked / reserved in the Development Plan on account of there being extensive slums on such plots.

[c] Subsequently it was found that eviction of such slum dwellers was extremely time consuming which would defeat the very purpose of the reservations for which the plots were earmarked.

[d] There was acute shortage of funds faced by the Government play grounds, Schools, D.P. Road, Bus Depot,

improvement of infrastructure such as widening of roads etc. could not be developed on account of financial crunch and eviction of slum.

[e] There was hardly any response from private developers to come and remove the slums and release the slums on plots owned by the developers because of restriction on use of TDR which will make the SRA Scheme viable and provide incentive to builders to come forward.

[f] The Afzalpurkar Committee which was appointed to go into the issue recorded the same and the Government in the larger public interest permitted use of Transferable Development Right in the corridors. With a view to strike a balance and promote speedy rehabilitation of the S.R.A. scheme in larger public interest decided to part use of TDR in the corridor areas as this would enable release of lands which were required for vital public purposes within the corridor area, like construction of road, over bridges, construction of eastern free

way, cleaning of area around nallahs for construction of storm water drains around the airport, expansion and widening of roads etc.

[g] In these circumstances, and in the larger public interest the GOM decided in 1997 to completely remove the ban on the use of Transferable Development Right in the corridor in order to implement vital public sector projects.

. In the Affidavit the GOM has stated that the apprehension that the use of Transferable Development Right in the corridor would result in immense congestion and over burdening of infrastructure was misconceived, in view of the implementation of MUTP and MUIP schemes which were to be carried out in the corridor areas and for which specific projects had been earmarked in order to improve the infrastructure. The concept of Transferable Development Rights and its application as is apparent from Afzalpurkar Committee Report, was intended to ensure the speedy and successful implementation of the Development Plan without placing any financial burden on the State.

50. In our opinion, the Petitioners had come to this court challenging D.C. Regulation which permitted additional, F.S.I. of 1 in the suburbs. In the areas other than those covered by the corridors, F.S.I. which can be used was 0.4 from the roads, 0.4 from the reservation and 0.2 from the slum TDR. The ban on use of the kind of TDR therefore would be inconsequential as long as additional FSI is restricted to 1. The State Government whilst removing the ban of use of TDR in the corridors did so with the object that the TDR developed from the slums had to be used in order to make S.R.A. scheme successful. This cannot be said to be irrational or arbitrary. The State has with the object of making the S.R.A. scheme successful lifted the ban on the corridors by permitting use of slum TDR. It is not as if in the other areas the slum TDR cannot be used. It can be used solely or in combination at any rate 0.2 has to be used when F.S.I. of 2.00 is being used. In our opinion, therefore, the argument as advanced as to the use of slum TDR as constituting as irrational classification, to our mind cannot be said to render App. VIIB ex facie arbitrary, discriminatory and ultra vires Article 14.

51. The utilization of Slum TDR is for the

object of redevelopment of slums which would not only help to rehabilitate slum dwellers and provide them with better amenities but would also facilitate the planning of the city by eradication of slums. In fact, there is a substantial concentration of slums in the corridor area itself and the utilization of Slum TDR would result in removal of slums from the corridor area and thereby relieve congestion in the corridor area. These amendments / modifications relate directly to issues of town and socio economic and, therefore have direct nexus and facilitate the objects of the MRTP Act.

. The T.D.R. policy is with the intent of improving the living condition of the slum dwellers. While balancing the need to improve the condition of the slum dwellers and the need not to burden the 3 corridors with additional construction by use of TDR, the legislature has adopted the former cause. The legislature has plenary power to adopt any course of action to remedy an evil viz., slums and such legislative policy cannot be questioned by the Courts unless unconstitutional. It is not permissible to the Court to ask the legislature, why in 1991 they did not allow the use of TDR in these corridors but in 1997 they thought

it fit to allow use of TDR in these corridors. These are matters of policy. It is possible that the earlier legislation had committed an error, may be the pressing need is felt now, may be it is adopting a lesser evil, may be it has adopted trial and error method. These are all policy matters, for socio economic planning. In such matter Courts scrutiny stops, once it has found that the enactment has rational nexus with the object to be achieved by the Act. The submission that use of slum and heritage TDR in these corridors will bring heavy pressure on the already over burdened infrastructure, affecting the life and living standards of residents thereby violating Article 14 and Article 21 of the Constitution cannot be sustained for reasons earlier given. The amended DCR is per se not arbitrary / discriminatory. The differentia which distinguishes these corridors from other areas in the island city, where such TDR cannot be used is intelligible, having nexus with the object of the Act. Differentia may be geographical or the gravity of need in a particular area or situation. The Petitioners have relied upon factual data which we have earlier considered. The same applies with more force for use of heritage TDR which has so far not been used. In view of the aforesaid, it is clear that the

utilization of TDR generated from slums and/or heritage buildings in the corridors are in consonance with the provisions of the MRTP Act.

52. Apart from the contentions which we have dealt with there are additional contentions which are required to be considered considering the prayer clauses. We shall first deal with prayer clause (h) by which it has been prayed that this Court to lay down the parameters of the discretionary powers given to the Municipal Commissioner under D.C. Regulation 64 (b) which reads as under:-

> ".64(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimensions prescribed these Regulations to be modified, except those relating to floor space indexes unless otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public safety of the inhabitants of the building and the

neighbourhood."

. The scope of Regulation 64(b)) of Development Control Regulation had come up for consideration before this court in the case of Mr. Rajendra Thakkar and others Vs. Municipal Corporation of Gr. Mumbai and others 2004(4) Bom.C.R. 1. The issue was regularization of several unauthorised constructions in Mumbai city. It was argued before the learned Division Bench, that Regulation 64(b) which confers discretionary powers on the Municipal Commissioner to grant relaxation and permit modification of dimensions described by the Development Control Regulation could only be exercised where there was material to show clearly demonstrable hardship. This court after considering various aspects issued direction to the Municipal Commissioner to reconsider the case for regularization/retention by issuing the following directions :

"(a) that the power and duty to decide the question of retention/regularisation of any unauthrosied development or grant of any modification/relaxation and which is required to be decided by the grant of a special permission will not be delegated by the Municipal Commissioner

to any of the officer. The Commissioner may take the opinion of the concerned Engineers but the final decision must be his for reasons to be recorded in writing (howsoever, the reasons may be brief, but they will be adequate).

(b) That while deciding such a question, the Municipal Commissioner, will consider all representations made by affected parties on the question in issue including any hardship or loss caused to them, which will include the affected residents/proposed buyers and affected residents at least in the immediate neighbourhood.

(c) That if any unauthorised development is in violation of any dimensions pertaining to FSI (unless where permitted by the Development Control Regulation), as on the date of decision, the same will not be regularised;

(d) If on the date of decision, the unauthorised development is found to be in violation of any rule, regulation or law, which violation cannot be waived/relaxed, then the said development should not be regularised. T.D.R. will not be permitted to reduce the amenities under the D.C. Regulations without adequately and fully compensating the residents/purchasers of the regular part of the structure for good reasons to be recorded in writing by the Commissioner.

(e) That the final order allowing retention must reflect application of mind as regards the "demonstrable hardship" for which the retention of an unauthorised development has been permitted.

(f) That similarly the final order allowing retention must indicate that the relaxation/concessions granted will not affect the health, safety, fire safety, structural safety and public safety of the inhabits of the building and the neighbourhood;

(g) Where a question of structural modification involving a further burdening of a structure is involved, the structural safety will be certified by a structural Engineer of B.M.C. who will grant such a certificate after inspecting the premises.

(h) If there is any loss of facility, requirement or amenity suffered by any person/persons having interest in the authorised part of any further unauthrosied development of which is sought to be retained/regularized, then such loss should be assessed at the market value of the concession granted and must form an ingredient computing premium. Whenever possible, this ingredient may be directed to be distributed to the persons who suffer such a loss. In addition the B.M.C. may also add to the premium any amount which may be reasonably required to be invested by it to put up additional infrastructure, if any, on or around the

> regularised structure. An amount o f fine for violation of law should be the third ingredient of the premium. The overall premium to be levied should be sufficiently deterrent so as to discourage a tendency to violate rules and building regulations. In the future, it will be desirable that the consent of such persons who would suffer any loss of facility, requirement or amenity should be filed alone with an application for retention."

. After having so observed, the learned Bench was also pleased to hold that Regulation 64 contains a discretionary power and by its very nature, these are powers to be sparingly exercised in specific cases where a demonstrable hardship is caused. The discretion is to be exercised as an exception and not by way of a rule.

. In normal cases the D.C. Regulations must be applied as they are. The learned Division Bench did not hold that Regulation 64(b) to be unreasonable and or ultra vires, but only laid down the parameters for exercise of discretion conferred by D.C. Regulation 64(b). In Sky Anchorage

Cooperative Housing Society Ltd. and another Vs.The Municipal Corporation of Greater Mumbai and others, decided on 23.7.2004 in Writ Petition No. 1304 of 2004, another Division Bench of the Court held that "The power under Regulation 64(b) at any rate cannot be exercised in case of development plan, which was sanctioned and building constructed in term of the development plan." It may be clarified that the expression "Development plan means building plans". The Court also held that the power under Section 64(b) cannot be exercised to regularise constructions in statutory open space. We may further add that it is a power to be exercised not generally but in specific cases to permit modification of the dimensions, provided the relaxation will not affect the health, safety, fire safety, structural safety and public safety. The Legislature itself has laid down the parameters for exercise of powers. Once that be the case it will not be open to the Municipal Commissioner to exercise powers under Regulation 64(b) contrary to what is set out therein and the judgments of this Court as to how that discretion must be exercised. In our opinion, therefore, the challenge in this petition on that count no longer survives as the regulation itself indicates the object for which the discretion is to be exercised and it has not

been seriously urged before this court in this petition.

53. Petitioner No.2 had also sought report from the Respondent No.2 on the plots acquired against grant of TDR wardwise and the premium along with the accrued interest earned during the last 12 years by giving concessions in open spaces, parkings and other relaxations. This really has no bearing on the challenge to the D.C. Regulations, but it is of vital import in so far as the revenue earned by the Respondent No.2. This revenue earned is against the relaxation given to set backs, open spaces and others which really are curbing the open spaces that are to be mandatorily kept while constructing a building in terms of the D.C. Regulations. This revenue is not to be expended by the Corporation as regular revenue, but to be separately kept on account of 'sustainable development' to be used for providing public amenities like parks, garden and playgrounds in the Wards from which the revenue is earned. The D.C. Regulations and Development Plan as notified and the M.R.T.P. Act does not exclude the principle of sustainable development. On the contrary as noted earlier Section 22 of the M.R.T.P. Act itself, takes into consideration these principles apart

from other provisions. These principles unless excluded are to be read in the statute both in the substantive legislation as also delegated legislation. As noted by the Supreme Court in **Friends Colony Development Committee vs. State of Orissa and Ors., (2004) 8 SCC 733**, there is a great emphasis in all developed and developing countries on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactment. The exercise of such discretionary power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations. Therefore, when relaxations are given for construction of buildings this revenue which is earned must be made available for providing more open spaces, gardens, parkings and other infrastructural activities which will balance the concession given. We, therefore, direct Respondents who earn revenue by relaxing the regulation if they have not done so far, to keep this revenue earned in a separate head of account and use it solely for infrastructural facilities

like parks and gardens in the Wards from which the income is generated and if it cannot be expended in that Ward in the neighbouring Wards and/or for generally the same purpose elsewhere. This applies both to Respondent No.1 and Respondent No.2.

53. The Jawaharlal Nehru National Urban Renewal Mission (JNNURM) launched by the Government of India requires each city to have its own City Development Plan within the framework of the various infrastructural investments. Respondent No.2 has prepared such a plan for 2005-2025. The plan notes that the development plan in force was planned for a population of 9.87 million which was already surpassed in 1991 itself. After taking into consideration the availability of the land to be developed one of the options mooted is to provide adequate housing at the rate of 12 sq. meter per person would be to increase the FSI considerably. It is noted that 60% of the city's population consists of slum dwellers and are situated within an estimated area of 35 sq. kilometres out of which 20% of the land is under various public reservations. It is estimated that an amount of Rupees Ninety eight thousand crores will be required to make Mumbai Slum Free. The report further indicates the lack of resources in

terms of providing public amenities for implementation of development plan. The lack of resources and other constraints have been the major factor in the non-implementation of the development plan. From the existing 3100 MLD litres per day against the requirement of around 3900 MLD, the requirement upto 2031 would be 5068 MLD. In so far as sewerage is concerned, the sewerage system covers only 42% of the population. On account of that Mumbai Sewerage Disposal Project II is being planned. Apart from that the Slum Sanitation Programme aims at providing 35,000 toilet seats. In so far as storm water drainage is concerned, a report known as BRIMSTOWAD report was prepared in 1993. Due to paucity of funds only 15% of the recommended works in the report have been implemented. In so far as urban transportation the plan notes that key issues faced by the transporting system are inadequate capacity of the existing arterial roads, overriding surfaces of the roads, traffic bottle-necks and overburdened suburban rail system. For that purpose the Mumbai Urban Transport Project is being executed. In so far as gardens and recreation spaces are concerned the respondent No.2 has kept 753 public open spaces admeasuring a total 4.4 sq. kilometres. The plan notes that due to huge gap in the housing demand

and supply for the urban poor, slums have cropped up all over the city. There are 1959 slum settlements, which are notified. In its report on environment it is pointed out that although air quality has improved in the city, the level of SMP has exceeded the standards at all sites except Borivali, whereas there is a decreasing trend of SO2 and CO levels, but NOX and respirable suspended particulate matter have shown an increasing trend over the last year and are exceeding the prescribed standards. The noise levels show higher levels in comparison with the prescribed standards.

54. The FSI released as TDR against Slum Redevelopment has necessarily to be used as per the present laws in the suburbs, as use of TDR in the Island City is prohibited. The population trend would indicate that in the year 1901 the Island City had 83.62% of the population and the suburbs 16.38%, by the year 2001 the Island City had only 24.68% and the suburbs had 75.32%. The migration to the City from rural and urban areas of Maharashtra averaged 43.51% in the year 1981 and in the year 1991 42.10% The net migration from U.P. which was 16.38% in 1981 has gone upto 19.7% whereas from Gujarat which was 13.86% has come down to 12.13%. This would indicate that the City

continues to draw migrants both from other parts of Maharashtra as also other States of the country. By the year 2020 the population is projected to grow to about 14.69 million of lower estimate to 16.31 million on the higher estimate. We have referred to these figures considering the present population of the city and protection of slums with the cut-off date 1st January, 1995. If over 50% of the population currently lives in the slums which occupy 34 sq. kilometres, the continued migration and more slum pockets after 1995 will result in further deterioration of the already inadequate infrastructure. One of the considerations in upholding the legislation was the submission made on behalf of the State Government that they would commence the process of the new plan by 2008, considering that the life time of the present plan would be upto 2011. Another aspect was that those in the protected slums must be given the chance of decent accommodation. The occupation of public and private lands, roads and footpaths, under the State's and local authorities benevolent eye, is indicative of the State's inability, to discharge its duties as a Trustee for its people. The State and local authorities are duty bound to prevent encroachments and to take steps to remove the encroachments and protect public property. The

answer to encroachment on public lands is not legalising further encroachment after the State Government has fixed the cut-off date as on 1st January, 1995. As noted by the Supreme Court, every official in charge of maintaining land free from encroachments is liable for disciplinary action, if no steps are taken to remove the encroachers. Any further protective measure is bound to affect the infrastructural facilities as the procedure for housing the dishoused and slum dwellers residing before 1.1.1995, generates additional FSI to be used in the suburbs, thereby affecting the quality of life and the concept of sustainable development. Mumbai amongst the cities has a chronic shortage of open/recreation spaces and parks. As against the norms adopted by the United Nations Development Agency which is 4 Acres per 1000 population, the city has 0.088. If the open areas occupied by slums are included the figure decreases to 0.03 acre per 1000 population. Those who pay their taxes also have a right to life, including living in a clean environment and with proper infrastructural needs. Their rights cannot be defeated merely on the pretext of housing those who continuously continue to occupy public and private lands for residence or business inspite of the cut-off date. There has to be a balancing

of rights. No Nation, no State or the Rule of law can survive, if illegalities continuously are legalised in the guise of social obligation. The State which has a constitutional duty to protect all the citizens cannot wear the mantle of Robinhood, by depriving the tax payer of his right by protecting and rewarding law breakers. Any further protective measures in favour of encroachers on public lands after 1.1.1995 apart from affecting the right to life, on account of inadequate infrastructure would also deprive the people of rural and urban areas of funds necessary for a healthy living. We have earlier set out the projected slum population. This would indicate that even in the year 2020 the slum population would be 60.35 lakhs. In 2001 it was 69.00 lakhs and in 2010 it is estimated to be 65.04 lakhs. Extraneous considerations, ought not to weigh with constitutional, State and statutory functionaries to condone encroachments on public land at the cost of rule of law and the honest tax payer. The Courts as the sentinel and protectors of the constitution and the Rule of law, will have to step in, if Constitutional authorities deviate from protecting the rights of its law abiding citizens.

55. We must place on record our appreciation of the assistance rendered to this Court by the

learned Amicus Curiae, Shri Aspi Chinoy, Senior Advocate as also by all the other Counsel who have assisted this Court. As we are disposing of the matter on merits, although in such matters delay would be a relevant consideration, considering the rights created in third parties, we do not propose to answer that issue.

56. We may now sum up our conclusions and issue some directions:

(1) We have noted that the existing infrastructure in terms of Parks, Play grounds, open spaces, water supply, sanitation and sewerage disposal, ambient quality of air and public transport is inadequate. There is serious congestion on roads and railways. Yet considering the cut off date as 1.1.1995 which shall not be extended further and bearing in mind the object behind the Slum Rehabilitation Scheme for those residing in slums or protected structures before 1.1.1995, we have rejected the challenge under Articles 14 and 21.

(2) The fees/compensation received by Respondent No. 2 from the exercise of discretionary powers under Regulation 64(b) by Respondent No. 2 or by

Respondent No.1, are directed to be kept under a separate revenue head for providing and maintaining parks, Play grounds, open spaces and such other amenities in the city of Mumbai. The wards from where the revenue is collected, however will have the first right on that Revenue for making provisions for parks, Play grounds and such other amenities, as the revenue is generated from those wards by relaxing the dimensions of space.

(3) Considering the complaints by the petitioners that the Respondent No. 2 is not acting on the complaints, Respondent No. 2 to set up a mechanism in the form of a Scheme in each ward, within eight weeks from today by designating officers by posts, to whom the citizens can file their complaints. The outer time limit be also fixed for deciding those complaints. The mechanism be put up on the website of Respondent No. 2. This mechanism to be also published in two leading Newspapers in the English language and one newspaper each, in Marathi, Hindi and Gujarati languages.

(4) We have recorded the statement made by the learned Advocate General that the process of new development plan will commence in 2008. We have however, noted that in respect of the development

plan published in the year 1991, the process had taken a long time. Considering that, Respondent No. 1 to consider initiating steps at the earliest for putting into place the mechanism for starting the process of the new development plan for 2011.

. For the aforesaid reasons, Rule made partly absolute in the aforementioned terms. In the circumstances of the case, there shall be no order as to costs. All interim orders stand vacated.

(DR. D.Y. CHANDRACHUD, J.) **(F.I. REBELLO, J.)**